AMY ADELE BUSEFINK, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57579

October 4, 2012 286 P.3d 599

Appeal from a judgment of conviction, pursuant to an *Alford*[1] plea, of two counts of conspiracy to commit the crime of compensation for registration of voters. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Defendant was convicted in the district court of conspiracy to commit the crime of compensation for registration of voters. Defendant appealed. The supreme court, GIBBONS, J., held that: (1) statute prohibiting compensation based on number of voters registered did not violate First Amendment, (2) statute was not unconstitutionally vague, and (3) statute had a general intent requirement.

**Affirmed.**

*Jones Vargas* and *Bradley Scott Schrager, Kevin R. Stolworthy*, and *Conor P. Flynn*, Las Vegas, for Appellant.

*Catherine Cortez Masto*, Attorney General, *Robert E. Wieland*, Senior Deputy Attorney General, and *Jared M. Frost*, Deputy Attorney General, Carson City, for Respondent.

*Allen Lichtenstein*, Las Vegas; *Ropes & Gray LLP* and *David O. Stewart*, Washington, D.C., for Amicus Curiae Project Vote.

1. CRIMINAL LAW.
   The supreme court reviews a constitutional challenge to a statute de novo.
2. CONSTITUTIONAL LAW.
   Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.
3. CONSTITUTIONAL LAW.
   The Free Speech Clause of the United States Constitution prohibits a state from significantly burdening potential speakers with financial disincentives to speak; compensation often induces individuals to engage in expressive activities, therefore a governmental entity may not unreasonably impede the provision of compensation to individuals who wish to engage in such activities for pay. U.S. CONST. amend. 1.
4. ELECTIONS.
   Voting is of the most fundamental significance under the constitutional structure.
5. ELECTIONS.
   To subject every voting regulation to strict scrutiny would tie the hands of states seeking to assure that elections are operated equitably and

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970) (permitting a plea of guilt even though the defendant still maintains her claim of innocence).

efficiently; accordingly, when reviewing the constitutionality of an election law, a more flexible and less exacting standard may apply.

6. CONSTITUTIONAL LAW.
When determining whether a state election law violates First and Fourteenth Amendment rights, a court must weigh the character and magnitude of the burden the state's rule imposes on those rights against the interests the state contends justify that burden, and consider the extent to which the state's concerns make the burden necessary. U.S. CONST. amends. 1, 14.

7. CONSTITUTIONAL LAW.
Election laws imposing severe burdens on First and Fourteenth Amendment rights are subject to strict scrutiny; where a state election law imposes a lesser burden, that law is subject to a less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. U.S. CONST. amends. 1, 14.

8. CONSTITUTIONAL LAW.
Because the statute that prohibited compensating voter registration canvassers based on the total number of registered voters did not place a severe burden on First Amendment rights, the supreme court would review the constitutionality of the statute pursuant to a less exacting standard of review rather than use strict scrutiny. U.S. CONST. amend. 1; NRS 293.805.

9. CONSTITUTIONAL LAW.
Constitutional challenges to specific provisions of a state's election laws cannot be resolved by any litmus-paper test that will separate valid from invalid restrictions; instead, the court must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the state as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. U.S. CONST. amends. 1, 14.

10. CONSTITUTIONAL LAW; ELECTIONS.
The minimal burden placed on First Amendment rights by the statute prohibiting compensating voter registration canvassers based on the total number of registered voters was reasonable in light of the State of Nevada's interest in preventing voter registration fraud. U.S. CONST. amend. 1; NRS 293.805.

11. CONSTITUTIONAL LAW.
Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. CONST. amends. 5, 14.

12. CRIMINAL LAW.
Vagueness may invalidate a criminal law if the statute fails to provide a person of ordinary intelligence fair notice of what is prohibited or if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.

13. CRIMINAL LAW.
Giving a statute's words their well settled and ordinarily understood meaning and looking to the common-law definitions of the related term or offense may provide clarity so as to defeat a vagueness challenge.

14. CONSTITUTIONAL LAW; ELECTIONS.
Term ''register'' as used in statute prohibiting compensating voter registration canvassers based on the total number of registered voters was not unconstitutionally vague; a person of ordinary intelligence would understand the term ''register'' to encompass handing out registration ap-

plications, helping individuals fill out registration applications, and submitting voter registration applications. U.S. CONST. amend. 14; NRS 293.805.

15. CONSTITUTIONAL LAW.
Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.

16. CONSTITUTIONAL LAW; ELECTIONS.
Term ''based upon,'' as used in statute prohibiting compensating voter registration canvassers based on the total number of registered voters, was not unconstitutionally vague; a plain reading of the statute provided an understanding that an employer could not use the amount of registrations obtained as a factor in determining pay. U.S. CONST. amend. 14; NRS 293.805.

17. ELECTIONS.
Statute prohibiting compensating voter registration canvassers based on the total number of registered voters had a general intent requirement. NRS 193.190, 293.805.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

## OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether NRS 293.805's prohibition against providing compensation to voter registration canvassers based upon the total number of voters a canvasser registers violates the First Amendment to the United States Constitution and/or is unconstitutionally vague.[2] We conclude that NRS 293.805 neither violates the First Amendment nor is unconstitutionally vague, and therefore, we affirm the judgment of conviction.

### *FACTS AND PROCEDURAL HISTORY*

In 2008, the Association of Community Organizations for Reform Now, Inc. (ACORN), hired voter registration canvassers in Las Vegas. ACORN originally paid these canvassers an hourly wage. After considering ways to increase productivity, ACORN's field director for Nevada suggested to appellant Amy Busefink, his supervisor, the idea of paying incentive bonuses to voter registration canvassers. Busefink granted the director permission to implement the incentive program between August and September 2008. Under this program, ACORN would pay canvassers a $5 bonus if a canvasser returned 21 or more voter registration appli-

[2]NRS 293.805(1) provides:

1. It is unlawful for a person to provide compensation for registering voters that is based upon:
(a) The total number of voters a person registers; or
(b) The total number of voters a person registers in a particular political party.

cations. ACORN's employees commonly referred to this program as ''21'' or ''blackjack,'' after the card game. Through this program, several canvassers obtained a $5 bonus for submitting 21 or more voter registration applications.

During this time, the Secretary of State's office began investigating complaints it received regarding voter registration applications submitted by ACORN. A subsequent investigation by the Secretary of State's office uncovered the ''blackjack'' program. The State then charged Busefink, ACORN, and ACORN's field director for Nevada with several counts of violating NRS 293.805.

At Busefink's preliminary hearing, the State provided evidence demonstrating that ACORN paid multiple canvassers the ''blackjack'' bonus for submitting 21 or more voter registration applications. Further, the investigator for the Secretary of State's office testified that canvassers submitted fraudulent voter registration applications. The justice court found reasonable cause to conclude that Busefink committed violations of NRS 293.805 and bound her case over to the district court for trial. Busefink filed a motion to dismiss the amended criminal complaint, arguing that NRS 293.805 is unconstitutionally vague and violates the First Amendment. The district court denied the motion to dismiss. Busefink then entered an *Alford* plea to two counts of conspiracy to commit the crime of compensation for registration of voters, and was adjudged guilty. The district court sentenced Busefink to a year in the Clark County Detention Center and required her to pay a $2,000 fine for each of the two counts. The district court then suspended the sentence, placed Busefink on informal probation, and required her to complete 100 hours of community service.

Busefink now appeals. For the reasons set forth below, we conclude that (1) NRS 293.805 triggers a ''less exacting'' standard of review than strict scrutiny; (2) the State demonstrated an interest sufficiently weighty to justify the limitation imposed on canvassing activities, and therefore, NRS 293.805 does not violate the First Amendment; and (3) NRS 293.805 is not unconstitutionally vague. Accordingly, we affirm the judgment of conviction.

## *DISCUSSION*

### I. *NRS 293.805 does not violate the First Amendment*

[Headnotes 1-3]

The central issue in this case is whether NRS 293.805's prohibition on the payment of individuals based upon the number of voters registered violates the First Amendment. We review a constitutional challenge to a statute de novo. *Pohlabel v. State*, 128 Nev. 1, 4, 268 P.3d 1264, 1266 (2012). '' 'Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute

is unconstitutional.' '' *Flamingo Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). The First Amendment provides that ''Congress shall make no law . . . abridging the freedom of speech.'' U.S. Const. amend. I. The ''freedom of speech'' is a fundamental right and liberty that is secured to all persons against abridgment by a State through the Fourteenth Amendment's due process clause. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). ''[T]he Free Speech Clause prohibits the State from significantly burdening potential speakers with financial disincentives to speak. . . . [C]ompensation often induces individuals to engage in expressive activities, [therefore] a governmental entity may not unreasonably impede the provision of compensation to individuals who wish to engage in such activities for pay.'' *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 162 (W.D. Pa. 2011) (internal citations omitted). To determine whether NRS 293.805 violates the First Amendment, we must (1) determine the applicable standard of review, and (2) apply that standard of review when weighing NRS 293.805's burdens on First Amendment rights and the State's interest in preventing fraud.

A. *NRS 293.805 triggers a ''less exacting'' standard of review than strict scrutiny*

[Headnotes 4-7]

'' '[V]oting is of the most fundamental significance under our constitutional structure.' '' *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). However, ''[e]lection laws will invariably impose some burden upon . . . voters.'' *Id.* ''Consequently, to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.'' *Id.* Accordingly, when reviewing the constitutionality of an election law, a ''more flexible'' and ''less exacting'' standard may apply. *Id.* at 434; *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Specifically, when determining whether a state election law violates First and Fourteenth Amendment rights, a court must ''weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.'' *Timmons*, 520 U.S. at 358 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Election laws imposing ''severe burdens'' on First and Fourteenth Amendment rights are subject to strict scrutiny. *Id.* Where a state election law imposes a ''lesser burden,'' that law is subject to a less exacting review, and a state's '' 'important regulatory interests' will usually be

enough to justify 'reasonable, nondiscriminatory restrictions.' ''[3] *Id.* (quoting *Burdick*, 504 U.S. at 434).

[Headnote 8]

In *Meyer v. Grant*, the United States Supreme Court categorized petition circulation as ''core political speech,'' any limitation upon which shall be subject to ''exacting scrutiny.'' 486 U.S. 414, 420-22 (1988). The Court held that a state constitutional amendment imposing a wholesale ban on compensating petition circulators violated the First Amendment by limiting the number of voices that would convey the petitioners' message, thereby limiting the size of the audience that the message will reach, and by making it less likely that the petitioners would obtain enough signatures to place the issue on the ballot. *Id.* at 423-24, 428. The Court noted that the state's interest in protecting the integrity of the initiative process did not justify the heavy burden that the constitutional amendment placed on such expressive speech. *Id.* at 426.

In interpreting *Meyer*, several courts subject statutes that ban payment of petition circulators on a per-signature basis to strict scrutiny. *See Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1165 (D. Idaho 2001); *On Our Terms '97 PAC v. Secretary of State, Maine*, 101 F. Supp. 2d 19, 25-26 (D. Me. 1999); *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 473 (S.D. Miss. 1997); *LIMIT v. Maleng*, 874 F. Supp. 1138, 1140-41 (W.D. Wash. 1994). However, we disagree with this interpretation of *Meyer* where, as here, the statute at issue places restrictions on the payment of voter registration canvassers rather than petition circulators.

In *Meyer*, the Court concluded that the statute at issue placed a heavy burden on speech because it restricted the number of persons an organization could get to circulate petitions and made it less likely that the organization's initiative would get on the ballot. 486 U.S. at 422-23. Because NRS 293.805 deals with restrictions

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[3]We note that courts ''apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.'' *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). NRS 293.805 does not prohibit payment of canvassers for all reasons; rather, it prohibits payment based upon the total number of persons registered or registered to a particular political party. *See* NRS 293.805(1). The Legislature enacted NRS 293.805 in order to prevent fraudulent voter-registration applications. *See* Hearing on S.B. 250 Before the Senate Government Affairs Comm., 67th Leg. (Nev., March 26, 1993). This restriction does not prohibit payment based on the content of an individual's speech; rather, it prohibits payment based on the procurement of a voter-registration application. *See* NRS 293.805. Thus, we conclude that this statute is content-neutral. *See Project Vote v. Kelly*, 805 F. Supp. 2d 152, 172 (W.D. Pa. 2011) (finding a statute content-neutral where the statute prohibited payment to persons who register voters based on the number of registrations or applications obtained).

on the payment of those who register voters, the restriction regarding an initiative not getting on the ballot is inapplicable. *See id*. Thus, the burden on speech caused by a restriction on the payment of those who register voters is less severe than the burden caused by statutes that restrict the payment of petition circulators. Further, unlike the statute at issue in *Meyer*, NRS 293.805 does not enact a wholesale ban on compensating voter registration canvassers. *See* NRS 293.805. Rather, NRS 293.805 prohibits payment of those who register voters based upon the number of persons registered. *Id*.

NRS 293.805's restrictions are similar to those found in the ballot measure at issue in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006). In *Prete*, the Ninth Circuit Court of Appeals held that a ballot measure that prohibited the payment of petition circulators on a per-signature basis did not severely burden First Amendment rights because it left open other avenues of payment and did not reduce the number of signatures obtained. *Id*. at 970-71. Similarly, NRS 293.805's restrictions leave open other avenues of payment and only prohibit payment based upon the number of persons one registers.

Further, in *Kelly*, the court found that a statute prohibiting payment of voter registration canvassers based upon the number of registrants obtained did not severely burden First Amendment rights. 805 F. Supp. 2d at 172-74. Thus, that court analyzed the statute under a ''less exacting'' standard of review. *Id*. We find that court's reasoning applicable here. Accordingly, because NRS 293.805 does not place a severe burden on First Amendment rights, we consider the validity of NRS 293.805 pursuant to a ''less exacting'' standard of review.

B. *The State's interest in preserving the integrity of Nevada's election process justifies NRS 293.805's restrictions*

[Headnotes 9, 10]

''Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions.'' *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Instead, we

> must weigh ''the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate'' against ''the precise interests put forward by the State as justifications for the burden imposed by its rule,'' taking into consideration ''the extent to which those interests make it necessary to burden the plaintiff's rights.''

*Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). In applying a ''less exacting'' standard of review, a ''State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' '' *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434).

1. *The injury to voter-registration activities resulting from NRS 293.805 is minimal*

Although NRS 293.805 prohibits payment based upon the number of persons that an individual registers to vote, there are other payment methods available. Thus, NRS 293.805 does not impose the same restrictions that the Sixth Circuit Court of Appeals found overly burdensome in *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 385-86 (6th Cir. 2008) (allowing only one method of paying voter registration canvassers). As noted above, unlike cases involving restrictions on the payment of petition canvassers, restrictions on the payment of those who register voters cause a lesser burden. *See Meyer*, 486 U.S. at 422-24. Finally, the prohibition of payment based upon the amount of registrations obtained does not inhibit an organization's ability to hire people to canvass for voter registrations, as other payment methods are available. *See Kelly*, 805 F. Supp. 2d at 173-74 (following similar reasoning in upholding a Pennsylvania statute that prohibited per-signature payment of those who register voters); *see, e.g.*, *Prete*, 438 F.3d at 963. Because the statute's restriction on per-application and per-party payment of canvassers is narrow and an organization still has the ability to hire and pay voter registration canvassers, we conclude that NRS 293.805 does not result in a significant injury to First Amendment rights.

2. *The State has an important regulatory interest in preventing fraud*

We look to the actions of other jurisdictions, NRS 293.805's legislative history, and the evidence in this case to determine the State's interest. We note that the United States Supreme Court has recognized that states can '' 'justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether.' '' *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)). Several jurisdictions recognize that commission-based compensation programs create an incentive to commit fraud. *Prete*, 438 F.3d at 969; *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 617-18 (8th Cir. 2001). These decisions recognize that a state has an important interest in preventing fraud. *Prete*, 438 F.3d at 969; *Initiative & Referendum Institute*, 241 F.3d at 617-18.

In 1992, the Las Vegas Metropolitan Police Department set up a special task force to investigate election fraud. Hearing on S.B. 250 Before the Senate Government Affairs Comm., 67th Leg. (Nev., March 26, 1993). During the investigation, the police discovered that a political party paid canvassers $2 for every voter registered with that party. *Id*. A police detective testified that this led to canvassers submitting fraudulent voter registration applications. *Id*. As a result, the Legislature enacted NRS 293.805 in an attempt to curb the incentive to commit voter-registration fraud. In this case, the investigator for the Secretary of State testified at the preliminary hearing that ACORN submitted fraudulent voter registration applications. Although the State did not prosecute anyone in connection to the fraudulent voter registration applications, this evidence demonstrates that the possibility of fraud is real. Thus, given the actions of other jurisdictions, NRS 293.805's legislative history, and the testimony during the preliminary hearing, we conclude that Nevada has an important regulatory interest in preventing voter-registration fraud.

3. *The State's interest in preventing fraud justifies NRS 293.805's minimal burden on First Amendment rights*

A state's interest need only be '' 'sufficiently weighty to justify the limitation' imposed on canvassing activities.'' *Kelly*, 805 F. Supp. 2d at 186 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). In every decision examined by this court in which a court applied ''less exacting'' scrutiny to a statute prohibiting payment of canvassers on a per-signature basis, the courts determined the statute was constitutional. *See, e.g.*, *Person v. New York State Bd of Elections*, 467 F.3d 141, 143 (2d Cir. 2006); *Prete*, 438 F.3d at 963-71; *Initiative & Referendum Institute*, 241 F.3d at 617-18; *Kelly*, 805 F. Supp. 2d at 187.

Under NRS 293.805, other payment options are available, the harm caused by the restrictions imposed is not significant, and organizations still have the ability to hire individuals to canvass. This minimal burden on First Amendment rights is reasonable in light of the State's interest in preventing voter registration fraud. The State's interest is sufficiently weighty to justify NRS 293.805's limitation on the payment of canvassers. Accordingly, NRS 293.805 does not violate the First Amendment.

II. *NRS 293.805 is not unconstitutionally vague*

Busefink argues that the word ''register[ ]'' as used in NRS 293.805 is impermissibly vague and does not cover the voter registration canvassers' conduct here. We disagree.

[Headnotes 11-14]

The ''[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause[s] of the Fifth' and Fourteenth Amendments to the United States Constitution.'' *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010) (second alteration in original) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). This court has held that ''[v]agueness may invalidate a criminal law . . . (1) if [the statute] 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.''' *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). ''Enough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a statute's words their well settled and ordinarily understood meaning, and by looking to the common law definitions of the related term or offense.'' *Id.* at 483, 245 P.3d at 553-54 (citations omitted). Further, ''every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'' *Id.* at 481, 245 P.3d at 552 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

[Headnote 15]

The term ''register'' as used in NRS 293.805 is not vague. The common dictionary definition of the term ''register'' is ''[t]o enroll formally or officially.'' *Webster's II New College Dictionary* 955 (3d ed. 2005); *see Black's Law Dictionary* 1396 (9th ed. 2009) (defining ''register'' as ''[t]o enroll formally''). Handing out registration applications, helping individuals fill out registration applications, and submitting voter registration applications fits this definition of register. If we were to adopt the narrow interpretation of the term ''register'' to not include the actions of canvassers helping individuals fill out registration applications and submitting them, it would be contrary to the definition above and the legislative intent in enacting this statute. In enacting NRS 293.805, the Legislature intended to curb voter registration fraud by precluding payment of those who register voters based upon the number of persons registered. *See* Hearing on S.B. 250 Before the Senate Government Affairs Comm., 67th Leg. (Nev., March 26, 1993). If we were to interpret the term ''register'' as not covering the conduct here, it would be contrary to the Legislature's intent. Given the definition of register above, a person of ordinary intelligence would understand the term ''register,'' as used in NRS 293.805, to encompass the voter registration canvassers' conduct in this case.

Busefink relies on the Secretary of State's recent proposal to amend the statute as evidence that the statute is vague and does not

clearly apply to private voter registration efforts.[4] However, the Secretary's proposal does not demonstrate that the term ''register'' is vague. Rather, the Secretary's proposal would have provided greater clarity to a statute that was already clear. Accordingly, we conclude that the term ''register'' as used in NRS 293.805 is not unconstitutionally vague.

[Headnote 16]

Busefink also argues that the term ''based upon,'' as used in NRS 293.805, is unconstitutionally vague. She argues that the term could mean that the statute bars compensation based upon any consideration of the number of persons one registers or compensation where the sole basis for determining compensation is the number of persons one registers. The term ''based upon'' in NRS 293.805 is not unconstitutionally vague. In *Kelly*, the court dealt with the issue of what ''based upon'' meant in a similar statute. 805 F. Supp. 2d at 169. The court found that the term prohibited commission payments—*e.g.*, compensation determined by the number of registrations obtained—but that the term did not preclude productivity goals and termination based on failure to meet productivity goals. *Id.* A plain reading of NRS 293.805 provides an understanding that an employer cannot use the amount of registrations obtained as a factor in determining pay. Accordingly, we conclude that the term ''based upon'' in NRS 293.805 is not vague.

[Headnote 17]

Busefink also contends that NRS 293.805 lacks an intent requirement, and thus, the statute is unconstitutionally vague. NRS 293.805 does not outline an intent element. However, the State contends that this court should read NRS 293.805 to incorporate a general intent requirement pursuant to NRS 193.190, which provides that ''[i]n every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence.'' In *Sheriff v. Burdg*, 118 Nev. 853, 858, 59 P.3d 484, 487 (2002), we held that NRS 193.190 did not alleviate the lack of an intent element in a statute that prohibited possessing a majority of ingredients required to make a controlled substance other than marijuana because it was not clear where the court would imply in-

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[4]The text of the proposed amendment to NRS Chapter 293 stated:

> An organizer of voter registration: . . .
>
> (c) [m]ay employ persons to assist the organizer of voter registration in registering voters in the State. The organizer of voter registration shall not provide compensation to any person hired pursuant to this paragraph that is based on the number of completed applications to register to vote that the person submits.

A.B. 82, 75th Leg. (Nev. 2009) (the Legislature did not enact this proposed legislation).

tent. *Id*. This court noted that the statute did not provide a person of ordinary intelligence with fair notice of what conduct the statute prohibited. *Id*. Here, the statute prohibits the payment of an individual based upon the number of voters registered. Given the nature of this prohibition and that this prohibition is clearly articulated by the statute, we conclude that NRS 293.805 provides adequate notice of what conduct is prohibited. Thus, unlike *Burdg*, a person who violates NRS 293.805 would know that they are violating the statute. *See id*. Further, a plain reading of the statute demonstrates that the intent would apply to the payment of workers based upon the number of voters registered. *See* NRS 293.805. Therefore, we interpret NRS 293.805 as having a general intent requirement.

NRS 293.805's terms are not ambiguous, and one would know that they are violating the statute. NRS 293.805 provides a person of ordinary intelligence sufficient notice of what conduct the statute prohibits and is not standardless as to encourage discriminatory enforcement. Accordingly, we conclude that the statute is not unconstitutionally vague.

## *CONCLUSION*

The specific restrictions set forth in NRS 293.805 place a minimal burden on First Amendment rights as the statute only prohibits payment of those who register voters based upon the number of voters one registers and the number of voters one registers for a particular political party. Nevada's interest in protecting the integrity of its election process and preventing voter registration fraud, when viewed in relation to this minimal burden, is sufficiently weighty to justify NRS 293.805's restrictions. Further, NRS 293.805 is not unconstitutionally vague. Accordingly, we affirm the judgment of conviction.

DOUGLAS and PARRAGUIRRE, JJ., concur.

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THE STATE OF NEVADA, APPELLANT, *v.*
JAVIER C., A MINOR, RESPONDENT.

No. 58622

October 4, 2012 289 P.3d 1194

Appeal from a district court order dismissing charge of battery committed by a prisoner under NRS 200.481(2)(f) against juvenile committed to Nevada Youth Training Center. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

State appealed from an order of the district court dismissing charge of felony battery by a prisoner that had been filed against

juvenile who allegedly battered a group supervisor while detained in a juvenile detention facility. The supreme court, PICKERING, J., held that juvenile was not a ''prisoner'' within meaning of felony battery by a prisoner statute.

**Affirmed.**

*Catherine Cortez Masto*, Attorney General, Carson City; *Mark Torvinen*, District Attorney, and *Mark S. Mills*, Deputy District Attorney, Elko County, for Appellant.

*Frederick B. Lee, Jr.*, Public Defender, Elko County, for Respondent.

1. INFANTS.
   Juvenile who was adjudicated delinquent and committed to detention facility was not a ''prisoner'' within meaning of felony battery-by-a-prisoner statute, and thus juvenile could not be charged as an adult with felony battery by a prisoner arising out of his alleged battery of a group supervisor while at the facility, even though juvenile was in custody under process of law, which fit criminal statute's definition of the term; criminal statute defining term did so for use in the criminal chapter of the statutory code, juvenile proceedings were not criminal in nature, and juvenile remained subject to delinquency or criminal proceedings under other battery statutes. NRS 62A.330, 62D.010(1)(a), 62E.010(1), 63.440(1), 193.022, 200.481(2)(f).
2. PRISONS.
   An alleged batterer who is held in custody under process of law, thereby seeming to meet criminal statute's literal definition of ''prisoner,'' does not automatically become subject to prosecution for felony battery by a prisoner; for criminal definition of prisoner and felony battery-by-a-prisoner statute to apply, the alleged batterer must have been in custody for criminal conduct, and his confinement must have occurred in the criminal context. NRS 193.022, 200.481(2)(f).
3. STATUTES.
   In interpreting statutes, Nevada follows the maxim ''expressio unius est exclusio alterius,'' meaning the expression of one thing is the exclusion of another.
4. STATUTES.
   The rule of lenity teaches that ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.
5. STATUTES.
   Under the rule of lenity, the tie must go to the defendant.

Before SAITTA, PICKERING and HARDESTY, JJ.

## OPINION

By the Court, PICKERING, J.:

We consider whether a juvenile detained for delinquency in a state facility is a ''prisoner'' for purposes of NRS 200.481(2)(f), Nevada's felony battery-by-a-prisoner statute.

I.

Respondent Javier C. was adjudicated delinquent and committed to the Nevada Youth Training Center (NYTC), ''a state facility for the detention or commitment of [delinquent] children.'' NRS 62A.330. While there, he allegedly battered a group supervisor. The State charged him as an adult with battery by a prisoner under NRS 200.481(2)(f), a category B felony.

On motion by Javier C., the district court dismissed the charge. Nevada's Juvenile Justice Code, NRS Title 5, emphasizes that ''[a] child who is adjudicated [delinquent] is not a criminal,'' NRS 62E.010(1), and that juvenile proceedings are not ''criminal in nature,'' NRS 62D.010(1)(a). Citing these statutes and *Robinson v. State*, 117 Nev. 97, 98, 17 P.3d 420, 421 (2001), which broadly holds that ''prisoner'' as used in NRS 200.481(2)(f) ''was 'meant to only apply in the criminal setting,' '' *id*. at 100, 17 P.3d at 422, Judge Puccinelli held that, because Javier C.'s detention at NYTC was civil, not criminal, he was not a ''prisoner'' to whom NRS 200.481(2)(f) could apply.

The State appeals. Our review is de novo, *see Lucero v. State*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (''we review questions of statutory interpretation de novo''), and we affirm.

II.

NRS 200.481 defines battery as ''any willful and unlawful use of force or violence upon the person of another.'' The statute then subdivides the crime of battery into misdemeanor, gross misdemeanor, and felony offenses depending on victim, means, setting, and resulting bodily harm.[1] Our focus is on NRS 200.481(2)(f), battery ''by a prisoner who is in lawful custody or confinement,'' since that is the charge the State brought against Javier C.

NRS 200.481(2)(f) reads in relevant part as follows:

> [A] person convicted of a battery . . . shall be punished:
>
> . . . .
>
> (f) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, without the use of a deadly weapon, whether or not substantial bodily harm results and whether or not the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

NRS 200.481 is part of Title 15 of the Nevada Revised Statutes, ''Crimes and Punishments,'' so ''unless the context requires oth-

[1]NRS 200.481 has been revised repeatedly over the years. It is reproduced in current form as an appendix to this opinion.

erwise,'' the definitions in NRS Chapter 193 apply. NRS 193.010; *see Dumaine v. State*, 103 Nev. 121, 124-25, 734 P.2d 1230, 1232-33 (1987) (consulting NRS 193.022's definition of ''prisoner'' in construing predecessor version of NRS 200.481(2)(f)). Under NRS 193.022, ''prisoner'' is defined to ''include[ ] any person held in custody under process of law, or under lawful arrest.''

[Headnote 1]

We considered what NRS 200.481(2)(f) and NRS 193.022 mean by ''prisoner'' in *Robinson v. State*, 117 Nev. 97, 17 P.3d 420 (2001). The battery in *Robinson* occurred in the Washoe County jail, where Robinson was confined after being taken into civil protective custody pursuant to NRS 458.270 for public drunkenness. *Id.* at 98, 17 P.3d at 421. While confined, Robinson beat up three of his cellmates, and the State charged him with battery by a prisoner under NRS 200.481(2)(f). *Id.* NRS 458.010(5) defines ''[c]ivil protective custody'' to mean ''a custodial placement of a person to protect the health or safety of the person'' and states: ''Civil protective custody does not have any criminal implication.'' Quoting NRS 458.010(5) (then numbered NRS 458.010(6)), this court reversed Robinson's battery-by-a-prisoner conviction. *Robinson*, 117 Nev. at 99-100, 17 P.3d at 422. We held that Robinson ''should not have been classified as a 'prisoner' when he committed the batteries,'' because ''prisoner'' as defined by NRS 193.022 and used in NRS 200.481(2)(f) ''was intended to apply solely in its criminal context.'' *Robinson*, 117 Nev. at 99, 17 P.3d at 422. ''[T]he term 'prisoner' only applies to individuals in custody for criminal conduct, and not to persons in civil protective custody.'' *Id.* at 98, 17 P.3d at 421.

[Headnote 2]

Like Robinson, Javier C. was ''in custody'' when the alleged battery occurred. *See* NRS 63.440(1) (juvenile court may commit ''a delinquent child to the custody of the Division of Child and Family Services''). His confinement was also ''under process of law,'' since his custodial placement followed a juvenile court delinquency adjudication conducted according to the legal processes provided in NRS Chapters 62C and 62D. But under *Robinson*, an alleged batterer who is ''held in custody under process of law,'' thereby seeming to meet NRS 193.022's literal definition of ''prisoner,'' does not automatically become subject to prosecution for felony battery by a prisoner under NRS 200.481(2)(f). In addition, for NRS 193.022 and NRS 200.481(2)(f) to apply, the alleged batterer must have been ''in custody for criminal conduct,'' *Robinson*, 117 Nev. at 98, 17 P.3d at 421, and his confinement must have occurred ''in [the] criminal context.'' *Id.* at 99, 17 P.3d at 422.

Both NRS 193.022 and NRS 200.481 are part of Title 15 of the Nevada Revised Statutes, ''Crimes and Punishments.'' *See Robinson*, 117 Nev. at 100, 17 P.3d at 422 (emphasizing that NRS 193.022 defines ''prisoner'' for use ''in the criminal chapter of the Nevada Revised Statutes''). Juvenile proceedings, by contrast, are governed by Title 5, ''Juvenile Justice.'' As with civil protective custody, the Legislature has specified that juvenile justice proceedings are ''not criminal in nature.'' NRS 62D.010(1)(a). Underscoring the point, NRS 62E.010(1) declares: ''A child who is adjudicated pursuant to the provisions of this title is *not* a criminal and any adjudication is *not* a conviction, and a child may be charged with a crime or convicted in a criminal proceeding *only* as provided in this title [5].'' (Emphases added.) And, as a facility for the ''detention or commitment of [delinquent] children,'' NRS 62A.330, NYTC ''[m]ust not be deemed to be or treated as a penal institution.'' NRS 62B.210(1)(b).

The State urges us to distinguish, not overrule, *Robinson*. In its view, Javier C.'s circumstances differ fundamentally from Robinson's. Javier C. committed acts that, if committed by an adult, amounted to felony theft. *See* NRS 62B.330(2)(c). The public drunkenness that landed Robinson in jail, by contrast, does not by law have ''any criminal implication.'' NRS 458.010(5). The State also offers a public policy argument: Juveniles detained in state facilities for delinquency present risks to their caretakers and others; applying the enhanced penalties provided by NRS 200.481(2)(f) for batteries by prisoners deters misconduct. Finally, the State points to NRS 62B.400(1), which provides that ''[a] child shall be deemed to be a prisoner who has escaped or attempted to escape from lawful custody in violation of NRS 212.090'' (which makes escape by an adult prisoner a crime) if, having been ''committed to or otherwise . . . placed in a public . . . facility for the detention or correctional care of children,'' the child ''[e]scapes or attempts to escape.'' If an adjudicated delinquent is a ''prisoner'' for purposes of the escape statute, the State argues, so, too, should he be a ''prisoner'' for purposes of NRS 200.481(2)(f). *See also In Interest of C.D.M*, 370 N.W.2d 287, 289 & n.2 (Wis. Ct. App. 1985) (holding that a delinquent confined to a secured juvenile correctional facility was subject to proceedings under special battery and assault statutes applicable to ''[a]ny prisoner confined to a state prison or other state, county or municipal detention facility'' (quoting Wis. Stat. §§ 940.20(1) and 946.43(1)).

[Headnote 3]

We reject the State's arguments. *Robinson* limits the custodial confinements that will support battery by a prisoner to *criminal* custodial confinements. By law, Javier C.'s custodial confinement is civil. As for the need to deter batteries by adjudicated delinquents housed at NYTC, juveniles remain subject to delinquency

or, if certified as an adult, criminal proceedings for battery under other provisions of NRS 200.481; we hold only that they are not ''prisoners'' and subject to prosecution for felony battery by a prisoner under NRS 200.481(2)(f).[2] Finally, NRS 62B.400(1), the detained-juvenile escape statute on which the State relies, militates against, not in favor of, applying NRS 200.481(2)(f) to detained juveniles: A child who escapes or attempts to escape from detention would not need to be ''*deemed* to be a prisoner who has escaped or attempted to escape from lawful custody,'' NRS 62B.400(1) (emphasis added), if he or she already occupied that status based on the definition in NRS 193.022. Also, Nevada follows the maxim ''expressio unius est exclusio alterius,'' the expression of one thing is the exclusion of another. *Cramer v. State, DMV*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010). The fact the Legislature specifically deemed juveniles to be prisoners for purposes of the adult criminal escape statutes suggests juveniles are not prisoners for other purposes, including application of NRS 200.481(2)(f).

[Headnotes 4, 5]

The rule of lenity teaches that, ''Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.'' Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (Thomson/West 2012); *Lucero*, 127 Nev. at 99, 249 P.3d at 1230 (the '' 'rule of lenity demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor' '' (quoting *Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006))); *see United States v. Santos*, 553 U.S. 507, 514 (2008) (''[t]his venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed''). At least one state has passed legislation expressly subjecting detained juveniles to the enhanced penalties applicable to prisoners who commit assaultive crimes. *See* Utah Code Ann. § 76-5-202(1)(a) (LexisNexis 2008), *discussed in State v. Gardner*, 947 P.2d 630 (Utah 1997). Lacking such language, NRS 200.481(2)(f)'s application to detained juveniles is uncertain at best. Under the rule of lenity, ''the tie must go to the defendant.'' *Santos*, 553 U.S. at 514. We therefore conclude that NRS 200.481(2)(f) does not apply to detained juveniles like Javier C. *See In re Rochelle B.*, 57 Cal. Rptr. 2d 851, 856-57 (Ct. App. 1996) (unless the Legislature specifically so states, ''juvenile

[2]NRS 200.481 provides enhanced penalties for attacks on state officials and attacks that involve substantial bodily injury, strangulation, or use of a deadly weapon. *See also* Hearing on S.B. 31 Before the Senate Judiciary Comm., 71st Leg. (Nev., Feb. 22, 2001) (noting that ''adding 'juvenile offenders' would complicate the intent of a bill'' intended to protect probation and parole officers since ''[j]uvenile officers who make home visits are already covered under the definition of 'officer' ''); NRS 200.481(1)(c) (defining ''officer'').

wards detained in juvenile hall are not subject to criminal statutes directed at 'prisoners' ''; limiting California's felony battery-by-a-prisoner statute to ''batteries committed against custodial officers in *adult* penal institutions''); *People v. Thompson*, 593 N.E.2d 154, 155 (Ill. App. Ct. 1992) (declining to find a juvenile adjudication and disposition to be the equivalent of a criminal conviction and sentence for purposes of an aggravated battery statute applicable to incarcerated felons: ''By well-settled principles of law, a criminal or penal statute is to be strictly construed in favor of an accused, and nothing is to be taken by intendment or implication against him beyond the obvious or literal meaning of such statute[ ]'').

For these reasons, we affirm.

SAITTA and HARDESTY, JJ., concur.

## APPENDIX A—NRS 200.481

**NRS 200.481 Battery: Definitions; penalties.**

1. As used in this section:

(a) ''Battery'' means any willful and unlawful use of force or violence upon the person of another.

(b) ''Child'' means a person less than 18 years of age.

(c) ''Officer'' means:

(1) A person who possesses some or all of the powers of a peace officer;

(2) A person employed in a full-time salaried occupation of fire fighting for the benefit or safety of the public;

(3) A member of a volunteer fire department;

(4) A jailer, guard, matron or other correctional officer of a city or county jail or detention facility;

(5) A justice of the Supreme Court, district judge, justice of the peace, municipal judge, magistrate, court commissioner, master or referee, including, without limitation, a person acting pro tempore in a capacity listed in this subparagraph; or

(6) An employee of the State or a political subdivision of the State whose official duties require the employee to make home visits.

(d) ''Provider of health care'' has the meaning ascribed to it in NRS 200.471.

(e) ''School employee'' means a licensed or unlicensed person employed by a board of trustees of a school district pursuant to NRS 391.100.

(f) ''Sporting event'' has the meaning ascribed to it in NRS 41.630.

(g) ''Sports official'' has the meaning ascribed to it in NRS 41.630.

(h) ''Strangulation'' means intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person in a manner that creates a risk of death or substantial bodily harm.

(i) ''Taxicab'' has the meaning ascribed to it in NRS 706.8816.

(j) ''Taxicab driver'' means a person who operates a taxicab.

(k) ''Transit operator'' means a person who operates a bus or other vehicle as part of a public mass transportation system.

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished:

(a) If the battery is not committed with a deadly weapon, and no substantial bodily harm to the victim results, except under circumstances where a greater penalty is provided in this section or NRS 197.090, for a misdemeanor.

(b) If the battery is not committed with a deadly weapon, and either substantial bodily harm to the victim results or the battery is committed by strangulation, for a category C felony as provided in NRS 193.130.

(c) If:

(1) The battery is committed upon an officer, provider of health care, school employee, taxicab driver or transit operator who was performing his or her duty or upon a sports official based on the performance of his or her duties at a sporting event;

(2) The officer, provider of health care, school employee, taxicab driver, transit operator or sports official suffers substantial bodily harm or the battery is committed by strangulation; and

(3) The person charged knew or should have known that the victim was an officer, provider of health care, school employee, taxicab driver, transit operator or sports official,

➥for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than $10,000, or by both fine and imprisonment.

(d) If the battery is committed upon an officer, provider of health care, school employee, taxicab driver or transit operator who is performing his or her duty or upon a sports official based on the performance of his or her duties at a sporting event and the person charged knew or should have known that the victim was an officer, provider of health care, school employee, taxicab driver, transit operator or sports official, for a gross misdemeanor, except under circumstances where a greater penalty is provided in this section.

(e) If the battery is committed with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a mini-

mum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000.

(2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $10,000.

(f) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, without the use of a deadly weapon, whether or not substantial bodily harm results and whether or not the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

(g) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years.

(2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.

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SHERIFF, PERSHING COUNTY, APPELLANT, *v.*
NICKOLAS MARK ANDREWS, RESPONDENT.

No. 58713

October 4, 2012 286 P.3d 262

Appeal from a district court order granting a pretrial petition for a writ of habeas corpus and dismissing a charge for possession of an item commonly used to escape. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

Inmate, who was charged with possession of an item commonly used to escape when a cell phone was found in his cell, sought writ of habeas corpus. The district court granted writ and dismissed charge. State appealed. The supreme court, SAITTA, J., held that statute under which inmate was convicted did not prohibit possession of cell phone.

**Affirmed.**

*Jim C. Shirley*, District Attorney, and *R. Bryce Shields*, Deputy District Attorney, Pershing County, for Appellant.

*Steven W. Cochran*, Public Defender, Pershing County, for Respondent.

1. Constitutional Law.
   The supreme court should avoid considering the constitutionality of a statute unless it is absolutely necessary to do so.
2. Appeal and Error.
   Statutory interpretation is a question of law subject to de novo review.
3. Statutes.
   In construing a statute, the supreme court's analysis begins with its text.
4. Statutes.
   When interpreting a statute, the supreme court construes multiple legislative provisions as a whole and attributes the plain meaning to a statute that is not ambiguous.
5. Prisons.
   Statute prohibiting county jail inmate from possessing ''any key, picklock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, hook or any other tool or item adapted, designed or commonly used for the purpose of escaping'' did not prohibit possession of cell phone; enumerated items and catchall provision of statute made clear that aim was to prohibit possession of devices used to forcibly break out of, or physically flee from, a jail cell, and there was separate statute prohibiting inmate from possessing ''portable telecommunications device.'' NRS 212.093(1), 212.165(3).

Before Saitta, Pickering and Hardesty, JJ.

## OPINION

By the Court, Saitta, J.:

Respondent Nickolas Mark Andrews was in custody at the Pershing County jail when officers discovered a cell phone hidden in a box beneath his bed. The State charged Andrews under NRS 212.093(1), which, in pertinent part, prohibits prisoners, including county jail inmates, from possessing ''any key, picklock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, hook or any other tool or item adapted, designed or commonly used for the purpose of escaping'' from custody. After being bound over to the district court, Andrews filed a pretrial petition for a writ of habeas corpus seeking to dismiss the charge, primarily arguing that NRS 212.093(1) is unconstitutionally vague and overbroad, and that, by its terms, the statute does not prohibit the possession of cell phones. The district court agreed with Andrews and dismissed the charge. The State now appeals; we affirm.

[Headnote 1]

In its appeal, the State argues, almost exclusively, that the district court erred in determining that NRS 212.093(1) is unconstitutional. It is well settled, however, that we should avoid considering the constitutionality of a statute unless it is absolutely necessary to do so. *See, e.g.*, *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1417 n.6, 952 P.2d 1, 8 n.6 (1997) (declining to consider whether a statute was unconstitutionally vague where principles of statutory construction fully resolved the case); *State v. Curler*, 26 Nev. 347, 354, 67 P. 1075, 1076 (1902) (''[I]t is a well-established rule of this and other courts that constitutional questions will never be passed upon, except when absolutely necessary to properly dispose of the particular case . . . .''). In keeping with this practice, we decline to reach the constitutionality of NRS 212.093(1), because by the statute's plain language, it does not prohibit the possession of cell phones. Thus, the district court correctly dismissed the charge against Andrews on that ground.

[Headnotes 2-4]

''Statutory interpretation is a question of law subject to de novo review.'' *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). In construing a statute, our analysis begins with its text. *In re State Engineer Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453 (2012). We construe ''multiple legislative provisions . . . as a whole,'' *Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 169 (2000), and ''attribute the plain meaning to a statute that is not ambiguous.'' *Catanio*, 120 Nev. at 1033, 102 P.3d at 590.

NRS 212.093(1) reads:

> Except as otherwise provided in subsection 4, a prisoner who is in lawful custody or confinement, other than residential confinement, *shall not knowingly manufacture, possess or have in his or her custody or control any key, picklock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, hook or any other tool or item adapted, designed or commonly used for the purpose of escaping* or attempting to escape from lawful custody or confinement, whether or not such an escape or attempted escape actually occurs.

(Emphasis added.)

Thus, NRS 212.093(1) makes it unlawful for prisoners, including county jail inmates, to possess certain items. But, as lawmakers often do, rather than attempting to list the entire universe of items that it wished to prohibit, the Nevada Legislature set forth a few concrete examples of devices that it was particularly concerned about and included a provision to cover similar items.

More specifically, the Legislature proscribed the possession of ''any key, picklock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, hook,'' or other devices that are ''adapted, designed or commonly used for the purpose of escaping.''

[Headnote 5]

The State acknowledges that NRS 212.093(1) does not expressly prohibit cell phones, but it argues that the phrase ''designed or commonly used for the purpose of escaping'' brings cell phones within the scope of the statute. We disagree. As the State conceded during oral argument, this phrase is simply a catchall provision. Thus, read together, the enumerated items and catchall provision make clear that the aim of the statute is to prohibit the possession of devices used to forcibly break out of, or physically flee from, a jail cell. The best indicium of meaning, of course, is the language of NRS 212.093(1). Each item specified therein is ordinarily understood, as it concerns jail settings, to either forcibly manipulate the confines of a jail cell—keys, picklocks, bolt cutters, wire cutters, saws, and digging tools—or physically exit from a jail cell—ropes, ladders, and hooks. In stark contrast to the items enumerated in NRS 212.093(1), it would be virtually impossible to use a cell phone to forcibly break out of, or physically flee from, a jail cell. Indeed, as the district court aptly noted during the hearing on Andrews' petition for a writ of habeas corpus, ''there is nothing remotely similar with a cell phone to a key, pick lock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, [or] hook.''

The State's overambitious reading of NRS 212.093(1) is akin to an interpretation that we rejected in *Puglisi v. State*, 102 Nev. 491, 728 P.2d 435 (1986). There, we considered whether ''a plastic, (Las Vegas) souvenir-type shopping bag'' fell within the purview of NRS 205.080, which prohibited, in relevant part, the possession of any tool commonly used for burglary. *Id.* at 493, 728 P.2d at 436-37. In rejecting the notion that such an item was a burglary tool, we reasoned that ''[i]n the broadest sense it can be argued that a bag is commonly used for the commission of burglary, larceny, or other crime, but so are trouser pockets, pocket books, coat sleeves, girdles and Adidas.'' *Id.* at 493, 728 P.2d at 437 (footnote omitted) (internal quotation omitted). Applying this reasoning here exposes the frailty of the State's interpretation of NRS 212.093(1). In the broadest sense, a cell phone could arguably be used to assist in an escape as it could be used to help enlist a third party to provide a getaway ride once an inmate has already fled from his or her jail cell. But, by this rubric, virtually any item—even shoes or spectacles—could fall within the scope of the statute because it could help an inmate to escape or evade recapture. Thus, if the State's argument were credited, then practically any item could fall within the scope of the statute.

Our conclusion that NRS 212.093(1) does not prohibit the possession of cell phones is further bolstered by reference to NRS 212.165(3), which provides, in pertinent part, that an inmate in state prison ''shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device.'' As Andrews points out, NRS 212.165(3) demonstrates that the Legislature clearly knows how to prohibit inmates from possessing cell phones but did not do so with respect to county jail inmates. Under long-standing principles of statutory construction, it is appropriate to infer from this distinction that the Legislature's omission of cell phones from NRS 212.093(1) was deliberate. *See Butler v. State*, 120 Nev. 879, 902, 102 P.3d 71, 87 (2004) (GIBBONS, J., concurring in part and dissenting in part) (noting the well-established rule of construction that the inclusion of one thing indicates that the omission of another was intentional).[1] In sum, we conclude that by its plain and unambiguous language, NRS 212.093(1) does not prohibit county jail inmates from possessing cell phones. Accordingly, we affirm the district court order dismissing the statutory charge against Andrews.

PICKERING and HARDESTY, JJ., concur.

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EVAN EDWARD GOUDGE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 59061

October 25, 2012 287 P.3d 301

Appeal from a district court order denying a post-conviction petition for release from lifetime supervision. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Defendant filed post-conviction petition for release from special sentence of lifetime supervision. The district court denied petition. Defendant appealed. The supreme court, HARDESTY, J., held that: (1) the district court lacked discretion to deny petition for release from lifetime supervision if it found statutory requirements were met, and (2) the district court's failure to address qualifications

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[1]The State suggests that NRS 212.165(3) is more specific than NRS 212.093(1) and that the statutes are conflicting. Therefore, it argues that we should harmonize the two statutes by adopting its interpretation of NRS 212.093(1). The State's argument is disingenuous because it cannot be said that NRS 212.165(3) is more specific than NRS 212.093(1) or that the statutes are somehow conflicting. Indeed, they concern entirely different circumstances. NRS 212.165(3) is relevant, as it relates to NRS 212.093(1), because it shows that the Legislature knows how to prohibit cell phones but chose not to do so in NRS 212.093(1).

of individual who conducted psychosexual evaluation warranted remand.

**Reversed and remanded.**

*Graves & Leavitt* and *John J. Graves, Jr.*, Las Vegas, for Appellant.

*Catherine Cortez Masto*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   Statutory interpretation questions are subject to de novo review.
2. STATUTES.
   When a statute's language is clear, the supreme court will apply the plain language in interpreting the statute.
3. SENTENCING AND PUNISHMENT.
   The district court had discretion to determine whether petitioner seeking release from lifetime supervision imposed following conviction for ''sexual offense'' met statutory requirements but lacked discretion to deny petition for release from lifetime supervision if it found statutory requirements were met. NRS 176.0931(3).
4. CRIMINAL LAW; SENTENCING AND PUNISHMENT.
   While a sentencing court has wide discretion in making sentencing decisions, the Legislature is empowered to define crimes and determine punishments, as long as it does so within constitutional limits.
5. SENTENCING AND PUNISHMENT.
   It is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes.
6. SENTENCING AND PUNISHMENT.
   In reaching its decision with regard to a petition for release from lifetime supervision imposed following conviction for ''sexual offense,'' district court must make factual findings in the record to support its ultimate conclusions with regard to each of the statutory requirements. NRS 176.0931(3).
7. CRIMINAL LAW; SENTENCING AND PUNISHMENT.
   The district court's failure, in proceeding in which defendant filed petition for release from a special sentence of lifetime supervision imposed following conviction for ''sexual offense,'' to address qualifications of individual who conducted psychosexual evaluation, or make any findings about sufficiency of individual's opinion that defendant was a low risk for sexual recidivism, warranted remand. NRS 176.0931(3).

Before the Court EN BANC.

## OPINION

By the Court, HARDESTY, J.:

In this appeal, we address a district court's discretion when resolving a petition for release from a special sentence of lifetime su-

pervision. NRS 176.0931(3), the statutory provision governing such petitions, provides that a district court ''shall grant a petition for release from a special sentence of lifetime supervision'' if certain requirements are met. Based on the plain language of this statute, we conclude that the district court has discretion to determine whether a petitioner has met the statutory requirements but lacks discretion to deny a petition for release from lifetime supervision if that court finds the statutory requirements were met. In this case, the district court denied the petition based on victim impact testimony and made no findings as to whether appellant had complied with the statutory requirements. Thus, we reverse the district court's judgment and remand the case for proceedings consistent with this opinion.

## *FACTS AND PROCEDURAL HISTORY*

In 2000, the State filed an amended criminal complaint against appellant Evan Goudge, asserting one count of lewdness with a child under 14 years of age with respect to one victim and one count of sexual assault of a minor under 14 years of age with respect to a different victim. Goudge entered into a guilty plea agreement and pleaded guilty to a single count of attempted lewdness with a child under 14 years of age. As part of the plea agreement, Goudge acknowledged that his sentence would include lifetime supervision.

In 2001, the district court entered a judgment of conviction against Goudge, sentencing him to a suspended sentence of incarceration with five years' probation and requiring him to register as a sex offender. In 2005, the district court entered an amended judgment of conviction to include lifetime supervision commencing upon Goudge's release from probation or incarceration.

The next year, Goudge was honorably discharged from his probation.

In 2011, Goudge petitioned for release from lifetime supervision.[1] As part of his petition, he argued that he had complied with all legal requirements imposed on him during probation and supervision, that he had not been convicted of a crime for more than ten years, and that it had been determined that he had a low risk of sexual recidivism. In support of his request to be released from lifetime supervision, Goudge attached to his petition a letter from a licensed clinical social worker and a report assessing Goudge's ''current level of sexual recidivism risk to the community.'' The re-

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[1]Goudge's petition, which initially also included a request that he be relieved from registering as a sex offender, was purportedly filed pursuant to NRS 179D.490, but that statute only applies to the sex offender registration requirement. Ultimately, the parties and the district court evaluated Goudge's lifetime supervision petition under NRS 176.0931, which is the statute at issue in this appeal.

port, which was prepared by Angele Morgan, a ''[s]tate approved evaluator for psychosexual evaluations and sex offender specific treatment,'' discussed the criminal charges against Goudge, his past and present significant relationships, profession, goals, and probation history. The report indicated that Goudge felt remorseful for his actions.

In the report, Morgan also discussed Goudge's risk assessment. She opined that Goudge had a ''low risk for sexual recidivism'' pursuant to the Sex Offender Needs Assessment Rating (SONAR), a risk assessment instrument that ''measure[s] changes in risk levels for sexual offenders.'' Morgan noted that Goudge had no formal probation violations, although, in the pre-interview for a polygraph test that he had taken, he had self-reported two minor probation violations for alcohol use and viewing pornography. Morgan also stated that Goudge did not disclose the self-reported violations or the results of the polygraph test in the interview with her, but she noted that Goudge's current supervisor had informed her that Goudge had passed the polygraph exam. Morgan concluded that Goudge presented ''as a low risk for sexual recidivism based on his SONAR score and his continued compliance under supervision over the last 10 years.'' She also concluded that Goudge appeared to be an appropriate candidate for release from lifetime supervision. In its opposition to the petition, the State opposed Goudge's request for release from lifetime supervision but observed that ''it appears that [Goudge] has met the requirements of NRS 176.0931 inclusive, and is entitled to release from lifetime supervision under the statute.''

The district court held a hearing on the lifetime supervision issue, during which the two victims and another member of their family testified.[2] Both alleged victims expressed concern regarding Goudge's potential release from supervision and indicated that they were still traumatized by his conduct. However, they also acknowledged that they had no contact with Goudge in the ten years preceding the hearing.

At the conclusion of the hearing, Goudge's counsel argued that release from lifetime supervision was required because Goudge had complied with the statutory requirements for release, whereas the

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[2]Before this hearing, the Nevada Division of Parole and Probation (P&P) informed the district court that Goudge's ''[p]sychosexual [e]valuation was provided by a valid state approved sex offender specific treatment agency,'' and it provided the district court with a risk assessment from Goudge's probation officers.

P&P also provided Goudge with documents that were used during Goudge's sentencing and that would be referred to at the lifetime supervision hearing. Further, P&P provided to the court and Goudge a recent statement from a licensed clinical social worker, recounting a recent visit she had with one of the victims, concluding that the victim had ''[lifelong] damage,'' and requesting that Goudge continue to be subject to lifetime supervision.

State argued that the statutory framework gave the district court discretion to determine Goudge's ''future dangerousness and whether or not lifetime supervision should be continued based upon that.'' The State also argued that, based on the testimony and other factors, there was ''a showing of potential future dangerousness.'' The State refuted the validity of Morgan's report, arguing, among other things, that it only acknowledged one victim, even though there were multiple victims.

After the hearing, the district court entered an order denying Goudge's petition ''based on the severity of the crime committed.'' Without analyzing the NRS 176.0931 factors, the district court found that it had discretion to consider witness testimony in evaluating whether appellant was a proper candidate for release from lifetime supervision. Based on ''the totality of the circumstances,'' the district court found that Goudge was not such a candidate. Specifically, because of ''concerns raised by the victim in the hearing on the matter,'' the district court was not satisfied that Goudge was no longer a threat to society. This appeal followed.

## *DISCUSSION*

[Headnotes 1, 2]

Determining the extent of a district court's discretion to resolve a petition for release from lifetime supervision requires us to interpret NRS 176.0931. Statutory interpretation questions are subject to de novo review. *See Webb v. Shull*, 128 Nev. 85, 88, 270 P.3d 1266, 1268 (2012). When a statute's language is clear, this court will apply the plain language in interpreting the statute. *Id.*; *see also Otak Nevada, LLC v. District Court*, 127 Nev. 593, 598, 260 P.3d 408, 411 (2011) (explaining that when a statutory phrase is clear and unambiguous, this court must give effect to that clear meaning and will not consider sources beyond the language of the statute to interpret it).

### I.

[Headnote 3]

On appeal, Goudge argues that he complied with the statutory requirements to earn a release from lifetime supervision and, thus, that the district court was required to grant his petition for release. In response, the State contends that, because determining punishments is within the purview of the district court, the court maintained discretion to decide whether Goudge would be relieved of his punishment. In furtherance of this argument, the State contends that Morgan's report was merely a recommendation, which the court was not obligated to follow in deciding whether to grant Goudge release from lifetime supervision.

When a person is convicted of a sexual offense, the district court is required to include a special sentence of lifetime supervision as part of the defendant's sentence. NRS 176.0931(1). This special sentence begins after any period of probation, term of imprisonment, or period of release on parole. NRS 176.0931(2). The person sentenced to lifetime supervision can petition the district court for release from lifetime supervision, however, if he or she satisfies three statutory requirements.[3] NRS 176.0931(3). First, the petitioner must have complied with Nevada's statutory requirements governing registration of sex offenders. NRS 176.0931(3)(a); NRS 179D.010-.550. Second, the petitioner must not have ''been convicted of an offense that poses a threat to the safety or well-being of others for an interval of at least 10 consecutive years after the person's last conviction or release from incarceration, whichever occurs later.'' NRS 176.0931(3)(b). Third, the petitioner must not be ''likely to pose a threat to the safety of others, as determined by a person professionally qualified to conduct psychosexual evaluations, if released from lifetime supervision.'' NRS 176.0931(3)(c). A '' '[p]erson professionally qualified to conduct psychosexual evaluations' means a person who has received training in conducting psychosexual evaluations,'' and is a psychiatrist, psychologist, social worker, registered psychiatric nurse, marriage and family therapist, or clinical professional counselor. NRS 176.133(1); NRS 176.0931(5)(b).

According to NRS 176.0931, if the petitioner meets the requirements set forth in NRS 176.0931(3), the district court ''shall grant [the] petition'' for release from lifetime supervision. The use of the word ''shall'' in the statute divests the district court of judicial discretion. *See* NRS 0.025(1)(d); *see also Otak Nevada*, 127 Nev. at 598, 260 P.3d at 411. This court has explained that, when used in a statute, the word ''shall'' imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute. *Id.*; *see also Johanson v. Dist. Ct.*, 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008) (explaining that '' '''shall'' is mandatory and does not denote judicial discretion' '' (quoting *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006))).

[Headnotes 4, 5]

Although the State argues that divesting a district court of discretion in this context renders the role of the judiciary meaningless with regard to determining whether convicted sex offenders are

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[3]A defendant can also petition the State Board of Parole Commissioners, which takes on the same role as the sentencing court in such situations. Because that was not the case here, we limit our discussion of NRS 176.0931(3) to the sentencing court.

ready to be released from lifetime supervision, reading the statute as mandatory does not encroach upon the judicial function. While a sentencing court has wide discretion in making sentencing decisions, *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), the Legislature is empowered to define crimes and determine punishments, as long as it does so within constitutional limits. *Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978). Moreover, ''it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes.'' *Mendoza-Lobos v. State*, 125 Nev. 634, 640, 218 P.3d 501, 505 (2009).

Because the Legislature can define punishments, we conclude that it is within the Legislature's power to limit punishments as well. Therefore, when the Legislature imposes mandatory language limiting the extent of a punishment, the district court must comply with the Legislature's mandate. Based on the plain language of NRS 176.0931, we conclude that the Legislature has limited the district court's discretion in the context of a petition for release from lifetime supervision, such that if the district court determines that a petitioner has complied with the statutory requirements, the district court lacks discretion to deny the petition for release from lifetime supervision.

## II.

We now consider the district court's assessment of Goudge's petition for release in this case. Whether a petitioner has satisfied the requirements of NRS 176.0931(3) involves factual determinations, which are given deference on appeal if they are supported by substantial evidence and are not clearly erroneous. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Additionally, a district court's decision as to whether a person is qualified to conduct a psychosexual evaluation is reviewed for an abuse of discretion. *See Austin v. State*, 123 Nev. 1, 8, 151 P.3d 60, 64 (2007) (reviewing the district court's decision as to whether a clinical social worker was qualified to perform a psychosexual evaluation for an abuse of discretion).

[Headnote 6]

In reaching its decision with regard to a petition for release from lifetime supervision, we conclude that the district court must make factual findings in the record to support its ultimate conclusions with regard to each of the statutory requirements. *See Lioce v. Cohen*, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008) (providing that a district court must make specific findings on the record when deciding a motion for a new trial). This is so because, when the district court fails to articulate its reasons for making a particular decision, this court cannot properly review that decision. *Webb*, 128 Nev. at 93, 270 P.3d at 1271.

[Headnote 7]

With regard to NRS 176.0931(3)'s requirements for release from lifetime supervision, the State only disputes Goudge's compliance with NRS 176.0931(3)(c), and therefore, we focus on that provision. As noted, NRS 176.0931(3)(c) provides that ''a person professionally qualified to conduct psychosexual evaluations'' must determine that the petitioner ''is not likely to pose a threat to the safety of others . . . if released from lifetime supervision.'' Thus, in considering this factor, the district court must determine whether the person who has performed the psychosexual evaluation is qualified to conduct such evaluations and, if so, whether that person has determined that the petitioner is not likely to pose a threat to the safety of others if released from supervision. If the court finds that the statutory expert is qualified and that the expert's opinion is sufficiently supported, then the third requirement has been satisfied. As long as the other two requirements are also satisfied, the petitioner is entitled to release from lifetime supervision.

Here, the district court did not address Morgan's qualifications or make any findings about the sufficiency of Morgan's opinion that Goudge was a low risk for sexual recidivism. *See Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (explaining, in the context of a motion to suppress, that ''[r]eviewing courts should not be required to surmise what factual findings that the trial court has made'' (internal quotation omitted)). Indeed, the district court did not mention Morgan or her report at all. Rather, the district court's abbreviated discussion of whether Goudge posed a threat to society focused on the ''concerns raised by the victim in the hearing on the matter.'' Victim testimony, however, is not a factor to be considered under NRS 176.0931(3). Because the district court failed to make any relevant findings related to the requirement set forth in NRS 176.0931(3)(c), we are unable to review the district court's factual findings for clear error and, ultimately, to determine whether Goudge's petition was properly denied. Accordingly, we reverse and remand this matter to the district court for further proceedings consistent with this opinion.

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, PICKERING, and PARRAGUIRRE, JJ., concur.

IN RE: FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC.

WILMINGTON TRUST FSB, AS ADMINISTRATIVE AGENT, APPELLANT, *v.* A1 CONCRETE CUTTING & DEMOLITION, LLC; A COMPANY PORTABLE RESTROOMS, INC., DBA A COMPANY, INC.; A TRACK-OUT SOLUTION LLC; ABATIX ENVIRONMENTAL CORP., DBA ABATIX CORP.; ABSOCOLD CORPORATION, DBA ECON APPLIANCE; ABSOLUTE METALS, LLC; AHERN RENTALS, INC.; AIR DESIGN TECHNOLOGIES, LLC; AIR SYSTEMS, INC.; AIRTEK PRODUCTS LLC; AK CONSTRUCTORS, INC.; ALABAMA METAL INDUSTRIES CORPORATION; ALLEGHENY MILLWORK PBT, DBA ALLEGHENY MILLWORK & LUMBER CO.; ALLEN DRILLING INC.; ALPINE STEEL LLC; AMERICAN AIR BALANCE CO., INC.; AMERICAN CRANE & HOIST ERECTORS, LLC; AMERICAN METAL FABRICATORS LLC; AMERICAN PACIFIC EXCAVATION INC.; AMERICAN SAND & GRAVEL, LTD.; ANIXTER INC., DBA ANIXTER INTERNATIONAL INC.; APEX CONCRETE CUTTING AND CORING, INC.; ARCELORMITTAL INTERNATIONAL AMERICA, LLC; ARCHITECTURAL MATERIALS INC., DBA AARON SMITH OF ARCHITECTURAL MATERIALS, INC.; ARCON FLOORING, INC.; ARIZONA TILE, LLC; ATLAS CONSTRUCTION CLEANUP INC.; ATLAS CONSTRUCTION SUPPLY, INC.; ATSS, INC., DBA ALLIED TRENCH SHORING SERVICE TRAFFIC CONTROL SERVICE, INC.; AUSTIN GENERAL CONTRACTING, INC.; AUSTIN HARDWOODS, INC.; AZ-PUS, INC.; AZTECH INSPECTION SERVICES, LLC; BAKERSFIELD PIPE AND SUPPLY, INC.; BERGMAN, WALLS, & ASSOCIATES, LTD.—ARCHITECTS; BESAM U.S., INC., DBA BESAM ENTRANCE SOLUTIONS; BESAM WEST, INC., DBA BESAM ENTRANCE SOLUTIONS; BOETHING TREELAND FARMS, INC.; BRADFORD PRODUCTS, LLC; BROWN-STRAUSS STEEL SALES, INC.; BURKE ENGINEERING CO.; C.R. LAURENCE CO., INC.; CADILLAC STONE WORKS, LLC; CALIFORNIA FLEX CORPORATION; CALIFORNIA WHOLESALE MATERIAL SUPPLY, LLC, DBA CALPLY DOOR SYSTEMS LV INC.; CARRARA MARBLE COMPANY OF AMERICA; CASHMAN EQUIPMENT COMPANY; CCCS INTERNATIONAL LLC; CECO CONCRETE CONSTRUCTION, LLC; CELLCRETE CORPORATION; CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC; CENTURY STEEL, INC.; CHEROKEE ERECTING COMPANY, LLC; CITY ELECTRIC SUPPLY

COMPANY; CLARK COUNTY FENCE COMPANY, LLC; CLQTS, LLC, FKA COMPASS LOGISTICS; CMC GROUP, LLC; CODALE ELECTRIC SUPPLY, INC.; COLLINGS INTERIORS, LLC; COMMERCIAL SCAFFOLDING OF NEVADA, INC.; COMMERCIAL ROOFERS, INC.; COMMUNICATIONS SUPPLY CORPORATION; CONCRETE CORING OF NEVADA, INC.; CONSTRUCTION SEALANTS SUPPLY, INC.; CONSUMERS PIPE AND SUPPLY CO.; CONTI ELECTRIC, INC.; CONTINENTAL GLASS & HARDWARE, INC.; COPPER STATE BOLT & NUT COMPANY, INC.; CORESLAB STRUCTURES (L.A.) INC.; CRESCENT ELECTRIC SUPPLY COMPANY, INC.; CUMMINS ROCKY MOUNTAIN, LLC; CURTIS STEEL CO., INC.; CWCI INSULATION OF NEVADA INC.; D&D STEEL, INC.; D'ALESSIO CONTRACTING, INC.; DAL-TILE CORPORATION; DANA KEPNER COMPANY, INC.; DERR AND GRUENEWALD CONSTRUCTION CO.; DESERT LUMBER LLC; DESERT PLUMBING & HEATING CO., INC.; DESIGN SPACE MODULAR BUILDINGS, INC.; DIELCO CRANE SERVICE, INC.; DIRECT PAVING & GRADING; DIRECT PAVING & GRADING, LLC; DIVERSIFIED CONCRETE CUTTING, INC.; DIVERSIFIED CONSTRUCTION SUPPLY, LLC; DOOR & HARDWARE MANAGEMENT, INC.; DOOR-KO, INC.; DSE CONSTRUCTION, INC.; DUNN-EDWARDS CORPORATION; EAGLE ENTERPRISES OF TN LLC; EAST IOWA DECKS SUPPORT, INC.; EBERHARD/SOUTHWEST ROOFING, INC.; EGGERS INDUSTRIES, INC.; EIDS STEEL COMPANY, LLC; ELMCO/FORD, INC., DBA ELMCO MECHANICAL LAS VEGAS; EM&C TRUCKING, LLC; EMBASSY GLASS; EMBASSY STEEL; ENERGY PRODUCTS OF NEVADA, INC.; ENGINEERED EQ. & SYSTEMS CO.; EUGENIO PAINTING COMPANY; F. RODGERS CORPORATION; FASTENERS INC. SOUTHWESTERN SUPPLY; FERGUSON ENTERPRISES, INC.; FF&E PURCHASING ASSOCIATES, LLC; FISK ELECTRIC COMPANY; FLIPPIN'S TRENCHING, LLP; FOUNTAIN SUPPLY COMPANY; FREHNER CONSTRUCTION COMPANY, INC.; GALLAGHER-KAISER CORPORATION; GARRETT MATERIALS, LLC, DBA GARRETT MATERIALS PROBUILD; GENERAL SUPPLY & SERVICES, INC., DBA GEXPRO; GEO CELL SOLUTIONS, INC., FKA GEO CELL SOLUTIONS, LLC; GEORGE M. RAYMOND CO.; GILLETTE CONSTRUCTION, LLC; GIROUX GLASS, INC.; GLENN RIEDER, INC.; GLOBAL SERVICES OF NEVADA, INC.; GRANI INSTALLATION INC.; GRAYBAR ELECTRIC

COMPANY, INC.; H&E EQUIPMENT SERVICES, INC.; HALTON CO.; HAMMOND CAULKING, INC.; HAMPTON TEDDER ELECTRIC COMPANY; HAMPTON TEDDER TECHNICAL SERVICES; HARRINGTON INDUSTRIAL PLASTICS, LLC; HARSCO CORPORATION, DBA PATENT CONSTRUCTION SYSTEMS; HD SUPPLY CONSTRUCTION SUPPLY, LIMITED PARTNERSHIP, DBA HD SUPPLY INC.; HD SUPPLY WATERWORKS, LP; HD SUPPLY WATERWORKS, LP, DBA HD SUPPLY WATERWORKS PC REGION; HD SUPPLY WATERWORKS, LP, DBA HD SUPPLY WHITE CAP; HEATING AND COOLING SUPPLY, INC.; HELOU & SONS, INC., DBA HELOU CONSTRUCTION, INC.; HENRI SPECIALTIES CO., INC., OF NEVADA; HERSHBERGER BROS. WELDING, INC.; HERTZ EQUIPMENT RENTAL CORPORATION; HILTI, INC.; HOTZ, LLC, DBA DRI-DESIGN; IBA CONSULTANTS WEST, LLC; IDEAL MECHANICAL, INC.; ILLUMINATING CONCEPTS, LTD.; INNCOM INTERNATIONAL, INC.; INSTEEL, LLC; INSULFOAM LLC; INSULPRO PROJECTS, INC., DBA GALE BUILDING PRODUCTS; INTEGRATED MECHANICAL GROUP, LLC, DBA IMG MECHANICAL GROUP; INTERMOUNTAIN LOCK & SUPPLY CO., DBA INTERMOUNTAIN LOCK & SECURITY; ITAL STONE, INC.; J&J ENTERPRISES SERVICES, INC.; J.F. DUNCAN INDUSTRIES, INC., DBA DURAY; J.B.A. CONSULTING ENGINEERS, INC.; JANIS SERVICES WEST, LLC; JENSEN ENTERPRISES, INC., DBA JENSEN PRECAST; JOHN A. MARTIN & ASSOCIATES OF NEVADA, INC.; JOHNSON CONTROLS, INC.; JOHNSON CONTROLS, INC., DBA JPRA ARCHITECTS, P.C.; JS&S, INC.; K&K CONSTRUCTION SUPPLY, INC.; KCG, INC., DBA REW MATERIALS; KEENAN, HOPKINS, SUDER & STOWELL CONTRACTORS, INC.; KELLY'S PIPE & SUPPLY CO., INC.; KIMLEY-HORN AND ASSOCIATES, INC.; KNORR SYSTEMS, INC.; L&P INTERIORS, LLC; L&W SUPPLY CORPORATION, DBA CALPLY; L.A. NEVADA, INC., DBA G&G SYSTEMS; LALLY STEEL, INC.; LANGAN ENGINEERING & ENVIRONMENTAL SERVICES, INC.; LAS VEGAS AWNINGS, LLC; LAS VEGAS PAVING CORPORATION; LAS VEGAS ROOFING SUPPLY, LLC; LAS VEGAS WINDUSTRIAL CO.; LEWIS CRANE & HOIST, LLC; LOCHSA, LLC, DBA LOCHSA ENGINEERING; LONE MOUNTAIN EXCAVATION & UTILITIES, LLC; LUKZ TRUCKING, INC.; LVI ENVIRONMENTAL OF

NEVADA, INC.; M&H BUILDING SPECIALTIES, INC.; MAC ARTHUR CO.; MARNELL MASONRY, INC.; McKEON DOOR OF NEVADA, INC.; MECHANICAL INSULATION SPECIALISTS; MECHANICAL PRODUCTS NEVADA, INC.; MECHANICAL SYSTEMS WEST, INC.; MERLI CONCRETE PUMPING OF NEVADA, INC.; METAL-WELD SPECIALTIES, INC.; MIDWEST DRYWALL CO., INC.; MIDWEST PRO PAINTING, INC.; MIGHTY CRANE SERVICE, LLC; MITCHELL CONSTRUCTION SERVICES, INC., DBA WESTERN DIAMOND; MODERNFOLD OF NEVADA, LLC; MOJAVE ELECTRIC COMPANY, LLC, AKA WEST EDNA ASSOCIATES, DBA MOJAVE ELECTRIC, INC.; MORRIS-SHEA BRIDGE COMPANY, INC.; MUNDEE TRUCKING, INC.; NEDCO SUPPLY; NES RENTALS HOLDINGS, INC., DBA NES RENTALS; NEVADA CONSTRUCTION CLEAN-UP; NEVADA READY MIX CORPORATION; NORMAN S. WRIGHT MECHANICAL EQUIPMENT CORPORATION; NOVA ENGINEERING AND ENVIRONMENTAL OF NEVADA, INC., FKA OWENS GEOTECHNICAL INC.; OLDCASTLE GLASS, INC., DBA OLDCASTLE GLASS WRIGHT CITY; OLSON PRECAST COMPANY; ORECO DUCT SYSTEMS, INC.; OSSIS IRON WORKS; P&S METALS; PACIFIC COAST STEEL, INC.; PACIFIC INSULATION COMPANY; PACIFIC STAIR CO.; PAHOR MECHANICAL CONTRACTORS, INC.; PAPÉ MATERIAL HANDLING, INC., AKA PAPÉ MATERIAL HOLDING, DBA PAPÉ RENTS; PAR ELECTRICAL CONTRACTORS, INC.; PARAMOUNT MANAGEMENT ENTERPRISES, LTD.; PARAMOUNT SCAFFOLD, INC.; PARTITION SPECIALTIES, INC.; PAUL BEBBLE & ASSOCIATES, INC.; PDM STEEL SERVICE CENTERS, INC.; PENHALL COMPANY; PERFORMANCE CONTRACTING, INC.; POTTER ROEMER; POWELL CABINET & FIXTURE CO.; PREMIER STEEL, INC.; PRIMARY STEEL, INC.; PRIME CONTRACTING, INC., DBA PRIME GRADING & PAVING; PRIME FABRICATION & SUPPLY; QED, INC.; QTS LOGISTICS, INC., DBA QUALITY TRANSPORTATION SERVICES OF NEVADA, INC.; QUALITY CABINET AND FIXTURE COMPANY; QUALITY TRANSPORTATION SERVICES OF NEVADA, INC.; QUICK CRETE PRODUCTS CORP.; RAM CONSTRUCTION SERVICES OF MICHIGAN, INC.; RAMON FERNANDEZ, AS ADMINISTRATOR OF THE ESTATE OF ANA FERNANDEZ; RAUL ESCOBEDO; RC WHITE CON-

SULTING, INC.; READY MIX, INC., DBA READY MIX CONCRETE; RED MOUNTAIN MACHINERY COMPANY; RELIABLE STEEL, INC.; REPUBLIC CRANE, LLC; RJF INTERNATIONAL CORP.; ROADSAFE TRAFFIC SYSTEMS, INC., F/K/A NES TRAFFIC SAFETY LP; ROCKWAY PRECAST, INC.; RONCELLI, INC.; RSC EQUIPMENT RENTAL, INC.; SAFE ELECTRONICS, INC.; SAFEWORKS LLC; SC STEEL, INC.; SIERRA GLASS & MIRROR, INC.; SILVER STATE MARBLE, LLC; SILVERADO ASSOCIATES, LLC; SMALLEY & COMPANY; SMITH PIPE & STEEL COMPANY (WHICH WILL DO BUSINESS IN CALIFORNIA AS CAZ STEEL COMPANY); SMK, INC.; SOUTHERN NEVADA PAVING, INC.; SOUTHWEST IRON WORKS, LLC; SQUIRES LUMBER COMPANY; STARLITE CONSTRUCTION, INC., DBA SHAWMUT DESIGN & CONSTRUCTION; STEEL ENGINEERS, INC.; STEEL STRUCTURES, INC.; STEELMAN PARTNERS, LLP; STERLING CORPORATE CUSTOM ELEVATOR INTERIORS; STETSON ELECTRIC, INC.; STINGER WELDING, INC.; STONE CONNECTION, LLC, DBA SAMFET; STRIPING SOLUTIONS, INC.; SUMMIT EXCAVATION, INC.; SUMMIT SAND & GRAVEL, INC.; SUNBELT RENTALS, INC.; SUNSTATE EQUIPMENT CO., LLC; SUPERIOR TILE & MARBLE, INC.; SYRACUSE CASTINGS WEST CORP.; T. NICKOLAS CO.; TECHNICOAT MANAGEMENT, INC.; THE GLIDDEN COMPANY, DBA ICI PAINTS; THE PENTA BUILDING GROUP, LLC; THE SHERWIN-WILLIAMS COMPANY; THE SOUTHWEST CIRCLE GROUP, INC.; THE WINROC CORPORATION (NEVADA); THYSSEN ELEVATOR CORPORATION; THYSSENKRUPP SAFWAY, INC., DBA SAFWAY SERVICES INC. (LV); THYSSENKRUPP SAFWAY, INC.; TMCX NEVADA, LLC; TOMARCO CONTRACTOR SPECIALTIES, INC.; TOTTEN TUBES, INC.; TRACTEL, INC.; TRACY & RYDER LANDSCAPE, INC.; TRENCH PLATE RENTAL CO.; TRI-POWER GROUP, INC.; ULMA FORM-WORKS, INC.; UNION ERECTORS, LLC; UNITED RENTALS GULF, LLC; UNITED RENTALS NORTHWEST, INC.; UNIVERSAL PIPING, INC.; VALLEYCREST LANDSCAPE DEVELOPMENT, INC.; VENTURA MARBLE, LLC; VFC, INC.; W&W STEEL, LLC OF NEVADA; W.R. GRACE & CO.-CONN., DBA GRACE CONSTRUCTION PRODUCTS; WACO INTERNATIONAL (WEST), INC., DBA WACO SCAFFOLDING & EQUIPMENT; WALNUT INVESTMENT CO., LLC, DBA ACOUSTICAL MATERIAL SERV-

ICES; WARD & HOWES ASSOCIATES, LTD.; WASHOUT SYSTEMS, LLC; WATER FX, LLC; WELLS CARGO, INC.; WHITE CAP CONSTRUCTION SUPPLY, INC.; WILLIAMS FURNACE CO.; WINTER COMPOSITES, LLC; YOUNG ELECTRIC SIGN COMPANY; YWS ARCHITECTS, LLC; ZETIAN SYSTEMS, INC.; Z-GLASS, INC., DBA Z WALL INC.; Z-GLASS, INC.; AND JMB CAPITAL PARTNERS MASTER FUND LLP, AS ASSIGNEE OF ALL CLAIMS HELD BY ASSIGNOR LIEN CLAIMANTS ADERHOLDT SPECIALTY COMPANY, INC., AMI HOSPITALITY, LLC, AKA ARCHITECTURAL MATERIALS INCORPORATED, BOMBARD ELECTRIC, LLC, BOMBARD MECHANICAL, LLC, COLASANTI SPECIALTY SERVICES, INC., DESERT FIRE PROTECTION, PEREGRINE INSTALLATION, CO., AND WARNER ENTERPRISES, INC., DBA SUN VALLEY ELECTRIC SUPPLY CO., RESPONDENTS.

No. 56452

October 25, 2012 289 P.3d 1199

Certified questions, pursuant to NRAP 5, regarding equitable subrogation and contractual subordination in a mechanic's lien context. United States Bankruptcy Court for the Southern District of Florida; A. Jay Cristol, Judge.

Debtor petitioned for relief under Chapter 11 of the Bankruptcy Code and the case was converted to a Chapter 7 liquidation. The United States District Court for the Southern District of Florida, A. Jay Cristol, J., certified questions. The supreme court, CHERRY, C.J., held that: (1) as a matter of first impression, plain language of statute establishing the priority of mechanics' liens precluded application of the doctrine of equitable subrogation in mechanic's lien context; (2) subordination agreements that purported to subordinate mechanics' liens prospectively were unenforceable; but (3) non-prospective subordination of mechanics' liens could be pursued through compliance with statutory requirements.

**Questions answered in part.**

*Parsons Behle & Latimer* and *Rew R. Goodenow*, Reno, for Appellant Wilmington Trust FSB.

*Thomas L. Abrams*, Plantation, Florida, for Respondents Ahern Rentals, Inc.; and Reliable Steel, Inc.

*Baker Hostetler* and *Richard J. Bernard*, New York, New York, for Respondents Coreslab Structures (L.A.) Inc.; Keenan, Hop-

kins, Suder & Stowell Contractors, Inc.; QTS Logistics, Inc.; and Quality Transportation Services of Nevada, Inc.

*Carla M. Barrow*, Coral Gables, Florida, for Respondent Fisk Electric Company.

*Brown Robert LLP* and *Seth P. Robert*, Fort Lauderdale, Florida, for Respondent McKeon Door of Nevada, Inc.

*Cooksey, Toolen, Gage, Duffy & Woog* and *Andrew R. Muehlbauer*, Las Vegas, for Respondent Steelman Partners, LLP.

*Shea & Carlyon, Ltd.*, and *Candace C. Carlyon*, Las Vegas, for Respondent Young Electric Sign Company.

*Duane Morris LLP* and *Jeffrey W. Spear*, Pittsburgh, Pennsylvania; *Duane Morris LLP* and *Warren D. Zaffuto*, Miami, Florida, for Respondents Century Steel, Inc.; and Pacific Coast Steel, Inc.

*Ehrenstein Charbonneau Calderin* and *Robert P. Charbonneau* and *Daniel L. Gold*, Miami, Florida, for Respondents Absocold Corporation; Austin General Contracting, Inc.; Austin Hardwoods, Inc.; Glenn Rieder, Inc.; Powell Cabinet & Fixture Co.; Safe Electronics, Inc.; Stone Connection, LLC; and Union Erectors, LLC.

*Fahrendorf, Viloria, Oliphant & Oster, LLP*, and *Scott F. Gilles* and *Jason A. Rose*, Reno, for Respondents Bradford Products, LLC; and Insteel, LLC.

*Gibbs, Giden, Locher, Turner & Senet LLP* and *Becky Ann Pintar*, Las Vegas, for Respondents D'Alessio Contracting, Inc.; and WACO International (West), Inc.

*Gordon & Rees LLP* and *Robert E. Schumacher* and *Jon M. Ludwig*, Las Vegas; *Ehrenstein Charbonneau Calderin* and *Robert P. Charbonneau* and *Daniel L. Gold*, Miami, Florida, for Respondent JMB Capital Partners Master Fund LLP.

*Gordon Silver* and *Gregory E. Garman, Thomas H. Fell*, and *Gabrielle A. Hamm*, Las Vegas, for Respondents Southern Nevada Paving, Inc.; Air Design Technologies, LLC; AirTek Products LLC; Cadillac Stone Works, LLC; Cemex Construction Materials Pacific, LLC; Collings Interiors, LLC; Commercial Roofers, Inc.; Conti Electric, Inc.; Desert Plumbing & Heating Co., Inc.; Eberhard/Southwest Roofing, Inc.; EIDS Steel Company, LLC; Gallagher-Kaiser Corporation; Geo Cell Solutions, Inc.; Inncom International, Inc.; J.F. Duncan Industries, Inc.;

JS&S, Inc.; Lally Steel, Inc.; L.A. Nevada Inc.; LVI Environmental of Nevada, Inc.; Marnell Masonry, Inc.; Mechanical Insulation Specialists; Midwest Drywall Co., Inc.; Midwest Pro Painting, Inc.; Modernfold of Nevada, LLC; Mojave Electric Company, LLC; Paramount Management Enterprises, Ltd.; Penhall Company; Performance Contracting, Inc.; Ram Construction Services of Michigan, Inc.; Silver State Marble, LLC; Superior Tile & Marble, Inc.; The PENTA Building Group, LLC; Technicoat Management, Inc.; Universal Piping, Inc.; W&W Steel, LLC of Nevada; Water FX, LLC; and Wells Cargo, Inc.

*Herold & Sager* and *Emily L. Grant* and *Linda L. Sager*, Encinitas, California, for Respondent Ital Stone, Inc.

*John C. Dotterrer Counsellors at Law* and *John C. Dotterrer* and *Jenny Torres*, Palm Beach, Florida, for Respondents Kimley-Horn and Associates, Inc.; Nova Engineering and Environmental of Nevada, Inc.; and Valleycrest Landscape Development, Inc.

*Leiderman Shelomith, P.A.*, and *Zach B. Shelomith*, Fort Lauderdale, Florida, for Respondent KCG, Inc.

*Markowitz, Davis, Ringel & Trusty, P.A.*, and *Ross R. Hartog*, Miami, Florida; *John R. Stevenson*, Birmingham, Michigan, for Respondent Eugenio Painting Company.

*May, Meacham & Davell, P.A.*, and *Robert C. Meacham*, Fort Lauderdale, Florida, for Respondents Cashman Equipment Company; Communications Supply Corporation; Crescent Electric Supply Company, Inc.; Derr and Gruenewald Construction Co.; Graybar Electric Company, Inc., H&E Equipment Services, Inc.; Hilti, Inc.; Integrated Mechanical Group, LLC; Morris-Shea Bridge Company, Inc.; Quality Cabinet and Fixture Company; Sierra Glass & Mirror, Inc.; Tracy & Ryder Landscape, Inc.; W.R. Grace & Co.-Conn.; Zetian Systems, Inc.; and Z-Glass, Inc.

*McAlpine & Associates* and *Don W. Blevins*, Auburn Hills, Michigan; *Lawrence H. Meuers*, Naples, Florida, for Respondent CCCS International LLC.

*McDonald Hopkins, LLC*, and *Tina M. Talarchyk*, West Palm Beach, Florida, for Respondents Giroux Glass, Inc.; and John A. Martin & Associates of Nevada, Inc.

*Messana Rosner & Stern* and *Thomas M. Messana* and *David N. Stern*, Fort Lauderdale, Florida, for Respondents QTS Logistics, Inc.; and Quality Transportation Services of Nevada, Inc.

*Michael R. Mushkin & Associates, P.C.*, and *Michael R. Mushkin*, Las Vegas, for Respondent Illuminating Concepts, Ltd.

*Harold W. Mitts, Jr.*, Overland Park, Kansas, for Respondent Pahor Mechanical Contractors, Inc.

*Muije & Varricchio* and *Phillip T. Varricchio*, Las Vegas, for Respondent Anixter Inc.

*Ozark Perron & Nelson, P.A.*, and *Andre R. Perron*, Bradenton, Florida; *Adam M. Shonson*, Miami, Florida, for Respondent The Sherwin-Williams Company.

*Palumbo Bergstrom* and *Erik D. Buzzard*, Irvine, California, for Respondent Winter Composites, LLC.

*Jimmy D. Parrish*, Orlando, Florida, for Respondents Coreslab Structures (L.A.) Inc.; and Keenan, Hopkins, Suder & Stowell Contractors, Inc.

*Pezzillo Lloyd* and *Brian J. Pezzillo* and *Jennifer R. Robinson*, Las Vegas, for Respondents Cashman Equipment Company; Communications Supply Corporation; Derr and Gruenewald Construction Co.; Graybar Electric Company, Inc.; H&E Equipment Services, Inc.; Hilti, Inc.; Quality Cabinet and Fixture Company; Tracy & Ryder Landscape, Inc.; W.R. Grace & Co.-Conn.; and Zetian Systems, Inc.

*Robert F. Reynolds*, Fort Lauderdale, Florida, for Respondents American Crane & Hoist Erectors, LLC; and Republic Crane, LLC.

*D. Jean Ryan*, Miami, Florida, for Respondent Tractel, Inc.

*Beverly J. Salhanick*, Las Vegas, for Respondent Reliable Steel, Inc.

*Shraiberg Ferrara & Landau, PA*, and *Philip J. Landau*, Boca Raton, Florida, for Respondents Allegheny Millwork PBT; Architectural Materials Inc.; Bergman, Walls, & Associates, Ltd.—Architects; Dana Kepner Company, Inc.; Desert Lumber LLC; Dielco Crane Service, Inc.; Door & Hardware Management, Inc.; Door-Ko, Inc.; Eagle Enterprises of TN, LLC; George M. Raymond Co.; Henri Specialties Co., Inc., of Nevada; J.B.A. Consulting Engineers, Inc.; Johnson Controls, Inc.; L&P Interiors, LLC; Lochsa, LLC; ThyssenKrupp Safway, Inc.; TMCX Nevada, LLC; and YWS Architects, LLC.

*Wright, Fulford, Moorhead & Brown, P.A.*, and *Edward M. Baird*, Altamonte Springs, Florida, for Respondent Insulpro Projects, Inc.

*A Company Portable Restrooms, Inc.*; *A Track-Out Solution LLC*; *Abatix Environmental Corp.*; *Absolute Metals, LLC*; *Air Systems, Inc.*; *AK Constructors, Inc.*; *Alabama Metal Industries Corporation*; *Allen Drilling Inc.*; *Alpine Steel LLC*; *American Air Balance Co., Inc.*; *American Metal Fabricators LLC*; *American Pacific Excavation Inc.*; *American Sand & Gravel, Ltd.*; *Apex Concrete Cutting and Coring, Inc.*; *Arcelormittal International America, LLC*; *Arcon Flooring, Inc.*; *Arizona Tile, LLC*; *Atlas Construction Cleanup Inc.*; *Atlas Construction Supply, Inc.*; *AZ-PUS, Inc.*; *Aztech Inspection Services, LLC*; *Bakersfield Pipe and Supply, Inc.*; *Besam U.S., Inc.*; *Besam West, Inc.*; *Boething Treeland Farms, Inc.*; *Brown-Strauss Steel Sales, Inc.*; *Burke Engineering Co.*; *C.R. Laurence Co., Inc.*; *California Flex Corporation*; *California Wholesale Material Supply, LLC*; *Carrara Marble Company of America*; *CECO Concrete Construction, LLC*; *Cellcrete Corporation*; *Cherokee Erecting Company, LLC*; *City Electric Supply Company*; *Clark County Fence Company, LLC*; *CLQTS, LLC*; *CMC Group, LLC*; *Codale Electric Supply, Inc.*; *Commercial Scaffolding of Nevada, Inc.*; *Concrete Coring of Nevada, Inc.*; *Construction Sealants Supply, Inc.*; *Consumers Pipe and Supply Co.*; *Continental Glass & Hardware, Inc.*; *Copper State Bolt & Nut Company, Inc.*; *Cummins Rocky Mountain, LLC*; *Curtis Steel Co., Inc.*; *CWCI Insulation of Nevada Inc.*; *D&D Steel, Inc.*; *Dal-Tile Corporation*; *Design Space Modular Buildings, Inc.*; *Direct Paving & Grading*; *Direct Paving & Grading, LLC*; *Diversified Concrete Cutting, Inc.*; *Diversified Construction Supply, LLC*; *DSE Construction, Inc.*; *Dunn-Edwards Corporation*; *East Iowa Decks Support, Inc.*; *Eggers Industries, Inc.*; *Elmco/Ford, Inc.*; *EM&C Trucking, LLC*; *Embassy Glass*; *Embassy Steel*; *Energy Products of Nevada, Inc.*; *Engineered Eq. & Systems Co.*; *Raul Escobedo*; *F. Rodgers Corporation*; *Fasteners Inc. Southwestern Supply*; *Ferguson Enterprises, Inc.*; *Ramon Fernandez, as Administrator of the Estate of Ana Fernandez*; *FF&E Purchasing Associates, LLC*; *Flippin's Trenching, LLP*; *Fountain Supply Company*; *Frehner Construction Company, Inc.*; *Garrett Materials, LLC*; *General Supply & Services, Inc.*; *Gillette Construction, LLC*; *Global Services of Nevada, Inc.*; *Grani Installation Inc.*; *Halton Co.*; *Hammond Caulking, Inc.*; *Hampton Tedder Electric Company*; *Hampton Tedder Technical Services*; *Harrington Industrial Plastics, LLC*; *Harsco Corporation*; *HD Supply Construction Supply, LP*; *HD Supply Waterworks, LP*; *Heating and Cooling Supply, Inc.*; *Helou & Sons, Inc.*; *Hershberger Bros. Welding, Inc.*; *Hertz Equipment*

*Rental Corporation*; *Hotz, LLC*; *IBA Consultants West, LLC*; *Ideal Mechanical, Inc.*; *Insulfoam LLC*; *Intermountain Lock & Supply Co.*; *J&J Enterprises Services, Inc.*; *Janis Services West, LLC*; *Jensen Enterprises, Inc.*; *K&K Construction Supply, Inc.*; *Kelly's Pipe & Supply Co., Inc.*; *Knorr Systems, Inc.*; *L&W Supply Corporation*; *Langan Engineering & Environmental Services, Inc.*; *Las Vegas Awnings, LLC*; *Las Vegas Paving Corporation*; *Las Vegas Roofing Supply, LLC*; *Las Vegas Windustrial Co.*; *Lewis Crane & Hoist, LLC*; *Lone Mountain Excavation & Utilities, LLC*; *Lukz Trucking, Inc.*; *M&H Building Specialties, Inc.*; *Mac Arthur Co.*; *Mechanical Products Nevada, Inc.*; *Mechanical Systems West, Inc.*; *Merli Concrete Pumping of Nevada, Inc.*; *Metal-Weld Specialties, Inc.*; *Mighty Crane Service, LLC*; *Mitchell Construction Services, Inc.*; *Mundee Trucking, Inc.*; *Nedco Supply*; *NES Rentals Holdings, Inc.*; *Nevada Construction Clean-Up*; *Nevada Ready Mix Corporation*; *Norman S. Wright Mechanical Equipment Corporation*; *Oldcastle Glass, Inc.*; *Olson Precast Company*; *Oreco Duct Systems, Inc.*; *Ossis Iron Works*; *P&S Metals*; *Pacific Insulation Company; Pacific Stair Co.*; *Papé Material Handling, Inc.*; *Par Electrical Contractors, Inc.*; *Paramount Scaffold, Inc.*; *Partition Specialties, Inc.*; *Paul Bebble & Associates, Inc.*; *PDM Steel Service Centers, Inc.*; *Potter Roemer*; *Premier Steel, Inc.*; *Primary Steel, Inc.*; *Prime Contracting, Inc.*; *Prime Fabrication & Supply*; *QED, Inc.*; *Quick Crete Products Corp.*; *RC White Consulting, Inc.*; *Ready Mix, Inc.*; *Red Mountain Machinery Company*; *RJF International Corp.*; *Roadsafe Traffic Systems, Inc.*; *Rockway Precast, Inc.*; *Roncelli, Inc.*; *RSC Equipment Rental, Inc.*; *Safeworks LLC*; *SC Steel, Inc.*; *Silverado Associates, LLC*; *Smalley & Company*; *Smith Pipe & Steel Company*; *SMK, Inc.*; *Southwest Iron Works, LLC*; *Squires Lumber Company*; *Starlite Construction, Inc.*; *Steel Engineers, Inc.*; *Steel Structures, Inc.*; *Sterling Corporate Custom Elevator Interiors*; *Stetson Electric, Inc.*; *Stinger Welding, Inc.*; *Striping Solutions, Inc.*; *Summit Excavation, Inc.*; *Summit Sand & Gravel, Inc.*; *Sunbelt Rentals, Inc.*; *Sunstate Equipment Co., LLC*; *Syracuse Castings West Corp.*; *T. Nickolas Co.*; *The Glidden Company*; *The Southwest Circle Group, Inc.*; *The Winroc Corporation (Nevada)*; *Thyssen Elevator Corporation*; *Tomarco Contractor Specialties, Inc.*; *Totten Tubes, Inc.*; *Trench Plate Rental Co.*; *Tri-Power Group, Inc.*; *Ulma Form-Works, Inc.*; *United Rentals Gulf, LLC*; *United Rentals Northwest, Inc.*; *Ventura Marble, LLC*; *VFC, Inc.*; *Walnut Investment Co., LLC*; *Ward & Howes Associates, Ltd.*; *Washout Systems, LLC*; *White Cap Construction Supply, Inc.*; and *Williams Furnace Co.*, in Proper Person.

*Jones Vargas* and *John P. Sande, III, John P. Desmond*, and *John P. Sande, IV*, Reno, for Amicus Curiae Nevada Bankers Association.

*Snell & Wilmer LLP* and *Leon F. Mead, II, Laura Ellen Browning, Marek P. Bute*, and *Kelly H. Dove*, Las Vegas, for Amici Curiae Associated General Contractors, Las Vegas Chapter; Nevada Association of Mechanical Contractors; and Nevada Chapter of the Associated General Contractors.

*Taggart & Taggart, Ltd.*, and *Paul G. Taggart*, Carson City, for Amicus Curiae Nevada Land Title Association.

1. FEDERAL COURTS.
   The decision to consider certified questions is within the supreme court's discretion. NRAP 5(a).
2. FEDERAL COURTS.
   In determining whether to exercise its discretion to consider certified questions, the supreme court looks to whether the answers may be determinative of part of the federal case, there is no controlling Nevada precedent, and the answer will help settle important questions of law. NRAP 5(a).
3. FEDERAL COURTS.
   Where certified question regarding whether mortgage was senior to the mechanics' liens by virtue of the legal doctrine of equitable subrogation and/or loan replacement and modification was largely factual and the discovery process was in its infancy, the supreme court would decline to answer certified question.
4. APPEAL AND ERROR.
   Issues of law are reviewed by the supreme court de novo.
5. SUBROGATION.
   Doctrine of equitable subrogation permits a person who pays off an encumbrance to assume the same priority position as the holder of the pervious encumbrance.
6. SUBROGATION.
   The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation and assignment to the payor or subrogee, permitting the subrogee to enforce the seniority of the satisfied lien against junior lienors.
7. SUBROGATION.
   Although equitable subrogation has the effect of an assignment of the discharged lien, it is not an absolute right and will not be granted if it will result in injustice or prejudice to an intervening lienor.
8. MECHANICS' LIENS.
   A mechanic's lien is a statutory creature established to help ensure payment for work or materials provided for construction or improvements on land. NRS 108.221 *et seq.*
9. MECHANICS' LIENS.
   Mechanic's lien statutes are remedial in character and should be liberally construed.
10. MECHANICS' LIENS.
    Legislature, through mechanic's lien statutes, has created a means to provide contractors secured payment for their work and materials, as contractors are generally in a vulnerable position because they extend large blocks of credit, invest significant time, labor, and materials into a project, and have any number of workers vitally depending upon them for eventual payment. NRS 108.221 *et seq.*

11. MECHANICS' LIENS.
    Legislature substantially revised the mechanic's lien statutes with the intent to facilitate payments to lien claimants. NRS 108.221 *et seq*.
12. MECHANICS' LIENS; MORTGAGES.
    Statute that establishes priority of mechanics' liens affirmatively gives mechanic's lien claimants priority over all other liens, mortgages, and encumbrances that attach after the commencement of a work of improvement. NRS 108.225.
13. MECHANICS' LIENS; SUBROGATION.
    Plain language of statute establishing the priority of mechanics' liens precluded application of the doctrine of equitable subrogation in the mechanic's lien context; statute unequivocally placed mechanic's lien claimants in an unassailable priority position. NRS 108.225.
14. STATUTES.
    Statutes that are capable of being understood in two or more senses by reasonably informed persons are ambiguous.
15. STATUTES.
    Ambiguous statutes are interpreted in accordance with the Legislature's intent.
16. MECHANICS' LIENS.
    Subordination agreements that purport to subordinate mechanics' liens prospectively are unenforceable. NRS 108.2453, 108.2457.
17. MECHANICS' LIENS.
    Non-prospective subordination of mechanics' liens may be pursued through compliance with the requirements of statute that states that any contract that attempts to waive or impair the lien rights of a contractor, subcontractor, or supplier is void, and that statement purporting to waive, release, or otherwise adversely affect the rights of a lien claimant is not enforceable, unless claimant executes written waiver and release and claimant received payment for the lien, but the waiver could be only to the extent of the payment received. NRS 108.2453, 108.2457.

Before the Court EN BANC.[1]

## OPINION

By the Court, CHERRY, C.J.:

The United States Bankruptcy Court for the Southern District of Florida has certified three questions to this court relating to the viability of equitable subrogation and the enforceability of contractual subordination against mechanic's lien claimants under Nevada's mechanic's and materialman's lien statutes, codified in NRS Chapter 108.[2] While we decline to answer the first question,

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[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter.

[2]The three certified questions were presented to us as follows:

> 1. Whether the Senior Lenders' mortgage is senior to the mechanics' liens by virtue of the legal doctrine of equitable subrogation and/or loan replacement and modification, inasmuch as loan proceeds secured by Bank of America, as administrative agent for the Senior Lenders, were

we entertain questions two and three because the answers may be determinative of part of the federal case, there is no controlling Nevada precedent, and the answers will help settle important questions of law. *See* NRAP 5; *Volvo Cars of North America v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1164 (2006).

The second question focuses on whether the doctrine of equitable subrogation may be applied against mechanic's lien claimants, such that a mortgage incurred after the commencement of work on a project will succeed to the senior priority position of a preexisting lien satisfied by the mortgagee, despite the existence of intervening mechanics' liens. Although this court has adopted mortgage subrogation principles, *see American Sterling Bank v. Johnny Mgmt. LV*, 126 Nev. 423, 245 P.3d 535 (2010); *Houston v. Bank of America*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003); *see also* Restatement (Third) of Prop.: Mortgages § 7.6 cmt. a (1997), we have never addressed whether equitable subrogation applies in the mechanic's lien context. NRS 108.225 is the controlling authority in Nevada regarding the priority of mechanics' liens. It expressly provides that every other mortgage or encumbrance imposed after the commencement of construction of a work of improvement is subordinate and subject to the mechanics' liens regardless of the recording dates of the notices of liens. Because principles of equity cannot trump an express statutory provision, we conclude that equitable subrogation does not apply against mechanic's lien claimants.

The third question asks this court to determine whether contractual subordination agreements executed by mechanic's lien claimants are enforceable. Pursuant to NRS 108.2453 and NRS 108.2457, we conclude that subordination agreements purporting to subordinate mechanics' liens prospectively are not enforceable. However, mechanic's lien claimants may waive their statutorily protected rights when the precise requirements of NRS 108.2457 are met.

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used to completely satisfy a senior mortgage which was rerecorded prior to the commencement of any work on the Project, with the expectation that the new loan would be secured by a lien with the same priority as the loan being satisfied?

2. Whether NRS [Chapter 108] prohibits the use of equitable subrogation as found in the Restatement [(Third)] of [Prop.:] Mortgages § 7.6, or the use of replacement and modification as found in the Restatement [(Third)] of [Prop.:] Mortgages § 7.3, to allow a mortgage to ''step into the shoes of'' a pre-existing lien (which was fully satisfied by the mortgagee) when such pre-existing lien was recorded prior to the commencement of any work or improvement giving rise to a statutory lien under NRS [Chapter 108]?

3. Whether subordination agreements executed by certain mechanics and materialman lien claimants, purporting to subordinate their liens to a new mortgage, are enforceable?

*FACTS AND PROCEDURAL HISTORY*

This court's review is limited to the facts provided by the certification order from the United States District Court for the Southern District of Florida and the complaint attached thereto, and we answer the questions of law posed to us based on those facts. *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 955, 267 P.3d 786, 795 (2011).

Debtor Fontainebleau Las Vegas Holdings, LLC, sought to construct and develop a $2.8 billion hotel-casino resort with gaming, lodging, convention, and entertainment amenities in Las Vegas, Nevada (the Project).[3] In 2005, Bank of America, N.A., in its capacity as an administrative agent for a syndicate of prepetition lenders, loaned Fontainebleau $150 million secured by a deed of trust in first priority position. Over 300 contractors and suppliers started construction on the Project, some of whom later asserted statutory mechanics' liens against the property. In 2007, Fontainebleau sought construction financing for the Project, and Bank of America, as agent, agreed to loan Fontainebleau $1.85 billion, to be dispersed in three stages. As partial security for the loan, Fontainebleau agreed to execute a deed of trust in favor of Bank of America to be recorded in first priority position. The 2007 credit agreement included a provision requiring the general contractor and subcontractors to subordinate their liens to the Bank of America deed of trust. Construction proceeded for a time, but at some point it appears that Bank of America refused to advance further funds under the existing loan commitments.[4] Work ceased, and Fontainebleau filed a petition for relief under Chapter 11 of the bankruptcy code in the United States District Court for the Southern District of Florida. Eventually, the property was sold, with the liens to attach to the proceeds, and the Chapter 11 reorganization proceeding was converted to a Chapter 7 liquidation.[5]

Appellant Wilmington Trust FSB succeeded Bank of America as administrative agent for the lenders. In 2009, Wilmington Trust filed an adversary proceeding in the bankruptcy court against re-

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[3]The Project is situated on approximately 24.4 acres at the sites of the former El Rancho Hotel and Algiers Hotel on the north end of the Las Vegas Strip. The Project is approximately 70 percent complete.

[4]The parties to the loan commitments are currently in litigation in the United States District Court for the Southern District of Florida in a proceeding unrelated to the adversary proceeding in which the certified questions arise.

[5]Fontainebleau sold substantially all of its assets to Icahn Nevada Gaming Acquisition, LLC. The sale was approved by the United States District Court for the Southern District of Florida in January 2010. The following month, Fontainebleau closed the sale transaction with Icahn, transferring its assets free and clear of all liens and encumbrances, with all liens and encumbrances from the Project attaching to the sale proceeds.

spondents, a multitude of contractors, subcontractors, and suppliers that have asserted statutory mechanics' liens against the property. The dispute between Wilmington Trust and the various contractors and suppliers over the priority of their respective liens on the property is at the center of the bankruptcy court's certified questions. In particular, the bankruptcy court has sought a ruling from this court regarding the application of equitable subrogation and contractual subordination in the context of the mechanics' liens. The bankruptcy court entered an order staying the proceedings until resolution of the certified questions by this court.[6]

## *DISCUSSION*

[Headnotes 1, 2]

The decision to consider certified questions is within this court's discretion. *See* NRAP 5(a) (stating that this court *may* answer certified questions). In determining whether to exercise its discretion to consider certified questions, this court looks to whether the ''answers may 'be determinative' of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law.'' *Volvo Cars of North America v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1164 (2006) (quoting *Ventura Group v. Ventura Port Dist.*, 16 P.3d 717, 719 (Cal. 2001)). This court is also constrained '' 'to resolving legal issues presented in the parties' pleadings.' '' *Orion Portfolio Servs. 2 v. Clark County*, 126 Nev. 397, 401, 245 P.3d 527, 530 (2010) (quoting *Terracon Consultants v. Mandalay Resort*, 125 Nev. 66, 72, 206 P.3d 81, 85 (2009)).

[Headnotes 3, 4]

Because the first question presented by the district court is largely factual and the discovery process is in its infancy, we decline to answer it, except to the extent that its answer is implicated in the answer to question two. *See Badillo v. American Brands, Inc.*, 117 Nev. 34, 38, 16 P.3d 435, 437 (2001) (declining to answer a certified question).[7] However, the remaining questions posed by the bankruptcy court squarely fit within the *Volvo* criteria. We conclude that our consideration of questions two and three is appropriate. We streamline questions two and three in order to

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[6]The Las Vegas Chapter of the Associated General Contractors, the Nevada Chapter of the Associated General Contractors, and the Nevada Association of Mechanical Contractors filed an amici brief supporting respondents. The Nevada Bankers Association and the Nevada Land Title Association filed amicus briefs supporting Wilmington Trust.

[7]We also decline to address whether this court should adopt Restatement (Third) of Prop.: Mortgages § 7.3 (1997).

best resolve the legal issues presented. *See Boorman v. Nevada Mem'l Cremation Society*, 126 Nev. 301, 304, 236 P.3d 4, 6 (2010) (rephrasing certified questions under NRAP 5). Both questions present issues of law that we review de novo. *American Sterling Bank v. Johnny Mgmt. LV*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010); *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

*Do Nevada's mechanic's and materialman's lien statutes prohibit the use of equitable subrogation?*

The second question concerns whether the doctrine of equitable subrogation can apply to allow a subsequent lender to claim the senior priority status of an original loan that the subsequent lender satisfied when contractors and suppliers hold intervening mechanics' liens.

[Headnotes 5-7]

We have previously applied equitable subrogation in the realm of mortgages in *Houston v. Bank of America*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003).[8] In *Houston*, we recognized that the doctrine of equitable subrogation ''permits 'a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance.' '' *Id.* (quoting *Mort v. U.S.*, 86 F.3d 890, 893 (9th Cir. 1996)). In other words, the doctrine ''enables 'a later-filed lienholder to leap-frog over an intervening lien[holder].' '' *American Sterling Bank v. Johnny Mgmt. LV*, 126 Nev. 423, 429, 245 P.3d 535, 539 (2010) (alteration in original) (quoting *Hicks v. Londre*, 125 P.3d 452, 456 (Colo. 2005)); *see* Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L. Rev. 305, 305 n.2 (2006) (lien priority is critical due to the risk ''that the foreclosure proceeds will be insufficient to pay the [lien] in full''). ''The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation and assignment to the payor or subrogee, permitting the subrogee to enforce the seniority of the satisfied lien against junior lienors.'' *American Sterling*, 126 Nev. at 429, 245 P.3d at 539. Although equitable subrogation has the effect of an assignment of the discharged lien, it is not an absolute right and will not be granted if it will result in injustice or preju-

[8]This court has recognized the doctrine of equitable subrogation in a variety of situations. *See, e.g.*, *AT&T Technologies, Inc. v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993) (workers' compensation); *Federal Ins. Co. v. Toiyabe Supply*, 82 Nev. 14, 409 P.2d 623 (1966) (negotiable instruments); *Globe Indem. v. Peterson-McCaslin*, 72 Nev. 282, 303 P.2d 414 (1956) (surety); *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915) (mortgages).

dice to an intervening lienor. *Houston*, 119 Nev. at 491, 78 P.3d at 75. After considering multiple approaches in applying the doctrine, we adopted the position taken by the Restatement (Third) of Property: Mortgages, whereby

> a mortgagee will be subrogated when it pays the entire loan of another as long as the mortgagee ''was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate.''

*Id*. at 490, 78 P.3d at 74 (quoting Restatement (Third) of Prop.: Mortgages § 7.6(a)(4) (1997)); *see* Nelson & Whitman, *Real Estate Finance Law* § 10.6, at 27 (5th ed. 2007).

While we have previously applied equitable subrogation principles, we have not addressed whether the doctrine displaces the priority plainly and specifically afforded to mechanic's lien claimants in NRS 108.225. *See Skyrme v. Occidental Mill and Mining Co.*, 8 Nev. 219, 232 (1873) (''a mechanic's lien is different from a mortgage executed by the consent of the parties''). In resolving the novel question presented to us by the bankruptcy court, we will independently review whether equitable subrogation applies under the framework of mechanics' liens. *American Sterling*, 126 Nev. at 428, 245 P.3d at 538; *see Hicks*, 125 P.3d at 455. Before we resolve whether the doctrine applies under the circumstances presented in this case, we will examine the purpose and history of mechanics' liens.

[Headnotes 8-10]

A mechanic's lien is a statutory creature established to help ensure payment for work or materials provided for construction or improvements on land. *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U.S. 128, 136 (1891); *California Commercial v. Amedeo Vegas I*, 119 Nev. 143, 146, 67 P.3d 328, 331 (2003); *Brunzell v. Lawyers Title*, 101 Nev. 395, 396-97, 705 P.2d 642, 644 (1985); *Schofield v. Copeland Lumber*, 101 Nev. 83, 84, 692 P.2d 519, 520 (1985); *see also Black's Law Dictionary* 1008 (9th ed. 2009) (defining a mechanic's lien as ''[a] statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real or personal property, such as a building, an automobile, or the like''). We have previously held '' 'that the mechanic's lien statutes are remedial in character and should be liberally construed.' '' *Lehrer McGovern*, 124 Nev. at 1115, 197 P.3d at 1041 (quoting *Las Vegas Plywood v. D & D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)); *see Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev.

528, 536, 245 P.3d 1149, 1155 (2010); *Peccole v. Luce & Goodfellow*, 66 Nev. 360, 373, 212 P.2d 718, 725 (1949); *Lamb v. Lucky Boy M. Co.*, 37 Nev. 9, 16, 138 P. 902, 904 (1914); *Malter v. Falcon M. Co.*, 18 Nev. 209, 212, 2 P. 50, 50 (1883). Legislators have created a means to provide contractors secured payment for their work and materials—''contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment.'' *Lehrer McGovern*, 124 Nev. at 1116, 197 P.3d at 1041 (citing *Connolly Develop., Inc. v. Sup. Ct. of Merced Cty.*, 553 P.2d 637, 653 (Cal. 1976)); *see Ferro v. Bargo M. Co.*, 37 Nev. 139, 141, 140 P. 527, 528 (1914).

The concept of a mechanic's lien originated in ancient Roman law. Edward H. Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. Pa. L. Rev. 1083, 1083 (1932). It was later embraced in France by the Code Napoleon and in other countries that have adopted civil law as the basis of their jurisprudence, including Belgium and Spain. *Moore-Mansfield Const. Co. v. Indianapolis, N. C. & T. Ry. Co.*, 101 N.E. 296, 301 (Ind. 1913); Samuel L. Phillips, *A Treatise on the Law of Mechanics' Liens on Real and Personal Property* 9-10 (2d ed. 1883). The first mechanic's lien law in America involving real property was enacted by Maryland in 1791.[9] *Frederick Contractors, Inc. v. Bel Pre Med. Ctr., Inc.*, 334 A.2d 526, 530 (Md. 1975). *Blose v. Havre Oil & Gas Co.*, 31 P.2d 738, 741 (Mont. 1934); *Key Agency v. Continental Cas. Co.*, 155 A.2d 547, 551 (N.J. 1959). Enacted upon the urging of Thomas Jefferson and James Madison, the goal of the law was to enable the swift construction of our nation's new capitol in the District of Columbia by protecting the interests of ''bricklayers, carpenters, joiners, or other workingmen.'' *Monroe & Co. v. Hannan*, 18 D.C. (7 Mackey) 197 (1889); *see Morris v. United States*, 174 U.S. 196, 301 (1899) (White, J., dissenting); *Premier Investments v. Suites of America*, 644 N.E.2d 124, 127 n.1 (Ind. 1994); *Fleming-Gilchrist Const. Co. v. McGonigle*, 89 S.W.2d 15, 19 (Mo. 1935); *Boyle v. Mountain Key Min. Co.*, 50 P. 347, 352-53 (N.M. 1897). Today, all 50 states have promulgated mechanic's lien statutes. *Independent Trust v. Stan Miller, Inc.*, 796 P.2d 483, 487 (Colo. 1990); *Frank H. Conner Co. v. Spanish Inns Charlotte N.C.*, 242 S.E.2d 785, 791 (N.C. 1978); *Nesdahl Surveying & Eng. v. Ackerland*, 507 N.W.2d 686, 690 (N.D. 1993); *see* Thomas Warner Smith, III, Note, *Mechanic's Lien Priority Rights for Design Professionals*, 46 Wash. & Lee L. Rev. 1035, 1038 (1989).

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[9]There is some indication that Pennsylvania implemented a mechanic's lien law relating to shipbuilders in 1784. *Neil v. Kinney*, 11 Ohio St. 58, 66 (Ohio 1860).

[Headnote 11]

Prior to statehood, the Legislative Assembly of the Territory of Nevada passed this state's first mechanic's lien law in 1861. 1861 Laws of the Territory of Nevada, ch. 16, at 35; *see Skyrme v. Occidental Mill and Mining Co.*, 8 Nev. 219, 228 (1873); *Hunter v. Savage Mining Co.*, 4 Nev. 153, 155 (1868).[10] As a ''product of legislative fiat'' in derogation of common law, *Fisher Bros., Inc. v. Harrah Realty Co.*, 92 Nev. 65, 67, 545 P.2d 203, 204 (1976), ''Nevada's mechanic[']s lien law is unique in the United States,'' because it has been ''almost entirely derived by work of the Nevada state legislature.''[11] Leon F. Mead II, *Nevada Construction Law* § 8.1 (2010).[12] In 2003 and 2005, in response to the Venetian lien litigation, *see Venetian Casino Resort v. Dist. Ct.*, 118 Nev. 124, 41 P.3d 327 (2002), the Legislature substantially revised the mechanic's lien statutes with the intent ''to facilitate payments to lien claimants.'' *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 538, 245 P.3d 1149, 1156 (2010); Mead II, *supra*, at § 8.1; *see* Hearing on S.B. 343 Before the Assembly Judiciary Comm., 73d Leg. (Nev., May 13, 2005) (mechanics' liens ''assist people who have improved real property so that they can get paid for their efforts'').

[Headnote 12]

NRS 108.225 is the controlling authority in Nevada regarding the priority of mechanics' liens. Amended in 2003, NRS 108.225 affirmatively gives mechanic's lien claimants priority over all other liens, mortgages, and encumbrances that attach *after* the commencement of a work of improvement:

> 1. [Mechanics'] liens . . . are preferred to:
>
> (a) Any lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement.

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[10]Other western states, including Idaho, Montana, Oregon, Utah, and Wyoming, also enacted similar mechanic's lien legislation before being recognized as states. *In re GVR Ltd. Co., Inc.*, 695 P.2d 1240, 1241 (Idaho 1985); *Merrigan v. English*, 22 P. 454, 456 (Mont. 1889); *Auld v. Starbard*, 173 P. 664, 666 (Or. 1918); *Doane v. Clinton*, 2 Utah 417, 419 (1877); *Weyerhaeuser Co. v. Walters*, 707 P.2d 733, 739 (Wyo. 1985) (Rose, J., dissenting).

[11]Although Nevada's mechanic's lien statutes have been extensively revised since 1861, they were originally ''borrowed from California.'' *Hunter v. Truckee Lodge*, 14 Nev. 24, 26 (1879).

[12]''Promulgation of a uniform mechanics' lien act was first attempted in 1925 and resulted in the Uniform Mechanics' Lien Law.'' Sara E. Dysart, Comment, *USLTA: Article 5 ''Construction Liens'' Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 St. Mary's L.J. 113, 116 n.17 (1980). However, only one state—Florida—adopted it. *Geiser v. Permacrete, Inc.*, 90 So. 2d 610, 612 (Fla. 1956).

> (b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against the property at the commencement of construction of a work of improvement.
>
> 2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by [mechanics'] liens . . . after the commencement of construction of a work of improvement are subordinate and subject to the [mechanics'] liens . . . regardless of the date of recording the notices of liens.

[Headnote 13]

Despite the plain and unambiguous language of the statute, Wilmington Trust requests that this court apply equitable subrogation, as it did in *Houston v. Bank of America*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003), in the mechanic's lien context.[13] *See MGM Mirage v. Nevada Ins. Guaranty Ass'n*, 125 Nev. 223, 228-29, 209 P.3d 766, 769 (2009) (''when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise''). Nearly 100 years ago, we recognized in *Lamb v. Lucky Boy M. Co.*, 37 Nev. 9, 16, 138 P. 902, 904 (1914), that mechanics' liens ''ha[ve] no place in equity jurisprudence.'' Moreover, ''[w]e have recognized

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[13]Wilmington Trust and amici Nevada Bankers Association and Nevada Land Title Association assert that this court should follow other jurisdictions that employ equitable subrogation in the realm of mechanics' liens. *See Lamb Excavation v. Chase Manhattan Mortg.*, 95 P.3d 542, 543-46 (Ariz. Ct. App. 2004); *Peterman-Donnelly Eng. & Con. Corp. v. First Nat. Bank*, 408 P.2d 841, 846 (Ariz. Ct. App. 1965); *Parker v. Tout*, 279 P. 431, 432 (Cal. 1929); *Detroit Steel Products Co. v. Hudes*, 151 N.E.2d 136, 139 (Ill. App. Ct. 1958); *Houston Lumber Co. v. Skaggs*, 613 P.2d 416, 417-18 (N.M. 1980); *Rock River Lumber v. Universal Mortg. Etc.*, 262 N.W.2d 114, 119-20 (Wis. 1978); *Bank of Baraboo v. Prothero*, 255 N.W. 126, 128 (Wis. 1934). ''However, every state seems to have a different version of the law with different requirements, different affected parties, and different beneficiaries.'' Ethan Glass, *Old Statutes Never Die . . . Nor Do They Fade Away: A Proposal for Modernizing Mechanics' Lien Law by Federal Action*, 27 Ohio N.U. L. Rev. 67, 96 (2000). Because of the diversity of mechanic's lien laws across the country, caselaw from other states ''should be approached with caution.'' *Independent Trust v. Stan Miller, Inc.*, 796 P.2d 483, 487 (Colo. 1990); *see Nickel Mine Brook v. Joseph E. Sakal*, 585 A.2d 1210, 1213 (Conn. 1991); *Woolridge v. Torgrimson*, 229 N.W. 805, 805 (N.D. 1930). Having considered our statutory scheme and the purpose behind our mechanic's lien statutes, we decline to adopt the cases from other jurisdictions that apply equitable subrogation in circumstances surrounding mechanics' liens because our lien laws are exclusive to this state. Unlike the apparent trend in other courts, we are not persuaded that equitable power contravenes express statutory language. Furthermore, Wilmington Trust had ample means to minimize its financial risk through the proper channels of contractual subordination. *See Ex Parte Lawson*, 6 So. 3d 7, 15-16 (Ala. 2008).

that . . . equitable principles will not justify a court's disregard of statutory requirements.'' *Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001); *see Blaine Equip. Co. v. State, Purchasing Div.*, 122 Nev. 860, 867-68, 138 P.3d 820, 824-25 (2006); *Mello v. Woodhouse*, 110 Nev. 366, 373, 872 P.2d 337, 341 (1994); *Smith v. Smith*, 68 Nev. 10, 23, 226 P.2d 279, 285 (1951). The Legislature has spoken and has created a specific statutory scheme whereby a mechanic's lien is afforded priority over a subsequent lien, mortgage, or encumbrance in order to safeguard payment for work and materials provided for construction or improvements on land. *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see Ex Parte Lawson*, 6 So. 3d 7, 15 (Ala. 2008). Therefore, we conclude that the plain and unambiguous language of NRS 108.225 precludes application of the doctrine of equitable subrogation, as it unequivocally places mechanic's lien claimants in an unassailable priority position. *See Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 578 n.4, 97 P.3d 1132, 1134 n.4 (2004) (''When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch.''); *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989) (''The legislature's intent should be given full effect.''). This position ''accords with Nevada's policy favoring contractors' rights to secured payment for labor, materials, and equipment furnished.'' *Lehrer McGovern*, 124 Nev. at 1116, 197 P.3d at 1041.

*Are subordination agreements executed by mechanic's lien claimants enforceable?*

The third question asks us to determine whether contractual subordination agreements defining or altering the rights and priorities of creditors' liens are enforceable when they are executed by mechanic's lien claimants. We conclude that subordination agreements that purport to subordinate the liens prospectively are unenforceable but that non-prospective subordination may be pursued through compliance with the requirements of NRS 108.2457. Accordingly, in appropriate circumstances, contracts can be structured to achieve subordination.

Our decision is guided by the statutory scheme. NRS 108.2453(1) provides that ''[e]xcept as otherwise provided in NRS 108.221 to 108.246, inclusive, a person may not waive or modify a right, obligation or liability set forth in the provisions of NRS 108.221 to 108.246, inclusive.'' *See also* NRS 108.2453(2)(a) (''A condition, stipulation or provision in a contract or other agreement for the improvement of property or for the construction, alteration

or repair of a work of improvement in this State that attempts to do any of the following is contrary to public policy and is void and unenforceable: (a) Require a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants, other than as expressly provided in NRS 108.221 to 108.246, inclusive.''). NRS 108.2457(5)(a)-(d) specifies, in relevant part, that

> 5. The waiver and release given by any lien claimant is unenforceable unless it is in the following forms in the following circumstances:
>
> (a) Where the lien claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress billing and the lien claimant is not in fact paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, . . . .
>
> (b) Where the lien claimant has been paid in full or a part of the amount provided for in the progress billing, . . . .
>
> (c) Where the lien claimant is required to execute a waiver and release in exchange for or to induce payment of a final billing and the lien claimant is not paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, . . . .
>
> (d) Where the lien claimant has been paid the final billing. . . .

*See also* NRS 108.2457(1) (allowing for lien waivers only when the lien claimant: ''(a) Executes and delivers a waiver and release that is signed by the lien claimant or the lien claimant's authorized agent in the form set forth in this section; and (b) In the case of a conditional waiver and release, receives payment of the amount identified in the conditional waiver and release.'').

[Headnote 14]

Concerning the interplay between NRS 108.2453 and NRS 108.2457, the parties take divergent positions. Wilmington Trust contends that the Legislature, by failing to explicitly proscribe subordination, did not intend to prevent lenders from seeking to protect their interest through subordination. It asserts that subordination agreements executed by mechanic's lien claimants that purport to subordinate their liens to a new mortgage are enforceable when they are not prospective. Respondents argue that NRS 108.2453 and NRS 108.2457 unambiguously prohibit the enforcement of contractual provisions requiring lien claimants to subordinate their interests to others, including lenders. Because these

statutes are ‘‘ ‘capable of being understood in two or more senses by reasonably informed persons,’ ’’ they are ambiguous. *Estate of LoMastro v. American Family Ins.*, 124 Nev. 1060, 1073, 195 P.3d 339, 348 (2008) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986)); *see also Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 535, 245 P.3d 1149, 1154 (2010) (concluding that NRS 108.2453(1) is ambiguous).

[Headnotes 15, 16]

Whether the statutes provide for prospective waivers is not clear from the plain language of the statutes; thus, we must look to the legislative history. Ambiguous statutes are interpreted in accordance with the Legislature's intent. *Hardy*, 126 Nev. at 533, 245 P.3d at 1154. The legislative history behind the enactments of NRS 108.2453 and NRS 108.2457[14] illuminates the Legislature's intent that prospective waivers of mechanics' liens are unenforceable. *See* Hearing on S.B. 206 Before the Senate Judiciary Comm., 72d Leg. (Nev., March 11, 2003) (‘‘The purpose of this bill is to prohibit the prospective waiver of a lien claimant's rights, and to confirm, clarify, and standardize the procedures and forms required for a waiver and release upon payment.’’ (Testimony of Steve G. Holloway, lobbyist for bill sponsors)); Hearing on S.B. 206 Before the Assembly Judiciary Comm., 72d Leg. (Nev., May 8, 2003) (‘‘Senate Bill 206 prohibits the prospective waiver of a lien claimant's rights. Doing so is good public policy. . . . Nevada deservedly has a reputation in the construction industry as being the worst state in the western United States in which to do business. Passage of S.B. 206 will do much to negate that reputation.’’ (Testimony of Steve G. Holloway)). To the extent that the subordination provisions are prospective, we conclude that NRS 108.2453 and NRS 108.2457 prohibit the enforcement of those subordination provisions.

[Headnote 17]

However, non-prospective subordination agreements may be enforceable, as neither NRS 108.2453 nor NRS 108.2457 completely prohibit waiver of or impairment to the right to a mechanic's lien after it arises. Therefore, non-prospective subordination agreements may be enforced as long as they meet the statutory requirements of NRS 108.2457. Accordingly, while prospective subordi-

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[14]‘‘[I]n 2003, the Legislature amended NRS Chapter 108 to prohibit lien waivers unless such waivers comply with the statutory requirements outlined in NRS 108.2453 and NRS 108.2457.’’ *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1115 n.39, 197 P.3d 1032, 1041 n.39 (2008); *see* 2003 Nev. Stat., ch. 427, §§ 25-26, at 2590-95.

nation agreements are unenforceable, respondents could have waived those rights provided by law after those rights arose provided that the requirements of NRS 108.2457 were met.

We therefore answer the certified questions as set forth above.

DOUGLAS, SAITTA, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

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JORGE HERNANDEZ, AN INDIVIDUAL; BRITTANY BURTNER, AN INDIVIDUAL; KEVIN MCNEAL, AN INDIVIDUAL; HEATHER NEELY, AN INDIVIDUAL; AND SCOTT SIMON, AN INDIVIDUAL, APPELLANTS, *v.* THE HONORABLE KAREN P. BENNETT-HARON, IN HER OFFICIAL CAPACITY AS CHIEF JUDGE OF LAS VEGAS TOWNSHIP JUSTICE COURT IN AND FOR CLARK COUNTY, NEVADA; P. MICHAEL MURPHY, IN HIS OFFICIAL CAPACITIES AS CORONER AND DEPUTY PUBLIC ADMINISTRATOR OF CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; AND CHRISTOPHER LAURENT, IN HIS OFFICIAL CAPACITY AS CHIEF DEPUTY DISTRICT ATTORNEY IN THE OFFICE OF DISTRICT ATTORNEY FOR CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, RESPONDENTS.

No. 59861

October 25, 2012 287 P.3d 305

Appeals from a final district court order in consolidated cases granting in part and denying in part declaratory relief and denying a complaint for an injunction challenging the constitutionality of a county ordinance. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Highway patrol officers filed complaint seeking declaratory relief and injunction challenging constitutionality of amended county ordinance establishing coroner's inquests into officer-involved deaths. The district court granted relief in part and denied relief in part. Parties appealed. The supreme court, HARDESTY, J., held that: (1) coroner's inquests into officer-involved deaths, as required by county code, served a fact-finding and investigatory function, rather than an adjudicatory one, and thus did not implicate officers' due process rights; (2) justices of the peace are not authorized to participate in inquest proceedings in counties with appointed coroners; (3) county ordinance providing for the participation of justices of the peace in coroner inquests into officer-involved deaths violated state constitutional provision vesting the

Legislature with exclusive authority to determine the jurisdiction of justices of the peace; and (4) unconstitutional provision of ordinance was not severable, such that entire inquest scheme regarding officer-involved deaths would be struck down.

**Reversed.**

*Reisman Sorokac* and *Joshua H. Reisman, Anthony Stirling*, and *Robert R. Warns, III*, Las Vegas, for Appellants.

*Garcia-Mendoza & Snavely, Chtd.*, and *Eva Garcia-Mendoza* and *Luther M. Snavely, III*, Las Vegas, for Respondents.

*Allen Lichtenstein* and *Katrina M. Rogers*, Las Vegas, for Amicus Curiae American Civil Liberties Union of Nevada.

1. Declaratory Judgment.
   Highway patrol officers' complaint seeking declaratory relief and injunction challenging constitutionality of amended county ordinance establishing coroner's inquests into officer-involved deaths was ripe for review, where inquest proceeding had already been initiated, and would harm officers, as they would be required to go through the inquest process without knowing the extent of any available due process protections and whether the individual presiding over the proceeding was constitutionally authorized to do so. Const. art. 1, § 8(5).
2. Declaratory Judgment.
   In the absence of any factual dispute, the supreme court reviews a district court's decision to grant or deny declaratory and injunctive relief de novo.
3. Appeal and Error.
   The supreme court reviews de novo determinations of whether a statute is constitutional.
4. Constitutional Law.
   Due process is an elusive concept; its exact boundaries are undefinable, and its content varies according to specific factual contexts. Const. art. 1, § 8(5).
5. Constitutional Law.
   The level of due process that must be provided in a particular government proceeding depends on the effect that the proceeding will have on a constitutionally protected interest. Const. art. 1, § 8(5).
6. Constitutional Law.
   When a government agency is conducting proceedings, due process mandates that the protections afforded depend on whether the proceedings result in a binding adjudication or a determination of legal rights, in which case due process protections are greater; such protections, however, need not be made available in proceedings that merely involve fact-finding or investigatory exercises by the government agency. Const. art. 1, § 8(5).
7. Constitutional Law.
   Determining whether particular due process protections must be provided requires consideration of the constitutional interest at stake, the type of proceeding being conducted, and the potential that such protections will be unduly burdened by the proceeding. Const. art. 1, § 8(5).

8. CONSTITUTIONAL LAW.
   Damage to one's reputation by itself is generally not a constitutionally protected interest.
9. CONSTITUTIONAL LAW; CORONERS.
   Coroner's inquests into officer-involved deaths, as required by county code, served a fact-finding and investigatory function, rather than an adjudicatory one, and thus did not implicate due process rights of officers; proceedings did not result in an adjudication or determination of officers' legal rights, sole product of the inquest process was factual findings which, in and of themselves, were not binding or entitled to preclusive effect in any future proceeding, inquest panel was not authorized to make a recommendation to the district attorney or any other law enforcement body, and interrogatories answered by inquest panel did not deal with questions of fault or guilt. Const. art. 1, § 8(5).
10. JUSTICES OF THE PEACE.
    The justice courts are courts of limited jurisdiction and have only the authority granted to them by statute. NRS 4.370(1).
11. STATUTES.
    When construing a statute, the court looks to the words in the statute to determine the plain meaning of the statute, and will not look beyond the express language unless it is clear that the plain meaning was not intended.
12. STATUTES.
    If a statute is ambiguous, the supreme court will look to the provision's legislative history and the scheme as a whole to determine what the framers intended.
13. STATUTES.
    Statutory language is ambiguous if it is capable of more than one reasonable interpretation.
14. STATUTES.
    The supreme court construes statutes to preserve harmony among them.
15. CORONERS.
    Statute permitting justices of the peace to preside over coroner's inquests in counties without an appointed coroner does not apply to authorize justices of the peace to preside over coroner's inquests in counties with appointed coroners. NRS 259.010(2), 259.050(4).
16. CONSTITUTIONAL LAW; CORONERS.
    In county with an appointed coroner, county ordinance providing for the participation of justices of the peace in coroner inquests into officer-involved deaths unconstitutionally impinged on the Legislature's constitutionally delegated authority to determine the jurisdiction of justices of the peace. Const. art. 6, § 8; NRS 259.010(2), 259.050(4).
17. STATUTES.
    A statute is severable only if the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed.
18. COUNTIES.
    Although severance clause contained in ordinance enacted by the board of county commissioners had not been codified in the county code, the supreme court would nonetheless consider the severance clause in determining whether an unconstitutional portion of the code enacted by that ordinance could be severed. NRS 244.095, 244.116.

19. CONSTITUTIONAL LAW; COUNTIES.

Provision of county ordinance that justices of the peace preside in coroner inquests into officer-involved deaths, which provision unconstitutionally impinged on the Legislature's constitutionally delegated authority to determine the jurisdiction of justices of the peace, was not severable from remaining provisions establishing inquest scheme regarding officer-involved deaths, and thus entire scheme would be struck down; although ordinance contained severance clause, county code made no provision for anyone other than a justice of the peace to serve as presiding officer in inquests involving officer-involved deaths, such that the officer-involved inquest scheme could not, standing alone, be given legal effect. Const. art. 6, § 8; NRS 259.010(2), 259.050(4).

Before the Court EN BANC.

## OPINION

By the Court, HARDESTY, J.:

In this opinion, we address the constitutionality of the Clark County Code of Ordinance provisions that establish coroner's inquests into an officer-involved death. Appellants, five Nevada Highway Patrol Officers, contend that the inquest procedures and provisions violate their due process rights under the Nevada Constitution and that, by requiring justices of the peace to preside over the inquest process, the Clark County Board of County Commissioners unconstitutionally impinged on the Legislature's authority to establish the jurisdiction of justices of the peace. Although we conclude that appellants' due process arguments fail, we determine that the code provision requiring that a justice of the peace serve as presiding officer in coroner's inquest proceedings regarding officer-involved deaths intrudes on the Legislature's exclusive authority over the jurisdiction of justices of the peace. Because the code makes no provision for anyone other than a justice of the peace to serve as presiding officer in such proceedings, we conclude that the offending provision cannot be severed, which requires the entire inquest scheme regarding officer-involved deaths to be struck down.

### *PROCEDURAL BACKGROUND*

The underlying coroner's inquest proceeding was prompted after appellants, Nevada Highway Patrol Officers, responded to an incident that resulted in a man's death. Before the inquest proceedings against appellants commenced, the Clark County Board of Commissioners amended the coroner's inquest ordinance. After appellants were notified that a coroner's inquest had been initiated, appellants filed separate complaints in the district court seeking declaratory and injunctive relief challenging the validity of the

amended ordinance based on asserted constitutional violations. The complaints were later consolidated.

According to the district court docket entries, appellants filed a motion and application for both a temporary restraining order and a preliminary injunction, which Clark County respondents opposed.[1] The day before the scheduled pre-inquest conference was to begin, the district court held a hearing on appellants' application for a temporary restraining order. The district court subsequently entered an order granting the request for a temporary restraining order, which prohibited the respondents from going forward with the inquest proceeding until the court ruled on the application for a preliminary injunction.

Thereafter, the district court entered a written judgment rejecting the majority of appellants' claims and upholding all but one of the Clark County code sections pertaining to inquest proceedings related to officer-involved deaths. The judgment also dissolved the temporary restraining order and denied injunctive relief. These appeals followed. This court subsequently granted, over respondents' opposition, appellants' emergency motion to stay the subject inquest proceedings and directed expedited briefing. The American Civil Liberties Union of Nevada was granted permission to file an amicus curiae brief in this matter and to participate in oral argument, which was held before the en banc court in Las Vegas.

## *CORONER'S INQUEST*

The legal questions presented on appeal concern the validity of the Clark County coroner's inquest procedures for officer-involved deaths as amended by the Board of Commissioners, and thus, we begin by examining the relevant code sections before considering the parties' arguments.

The board of county commissioners for any county in this state is authorized by statute, NRS 244.163, to create a county coroner's office.[2] Currently, Clark and Washoe Counties are the only counties in the state to have coroner's offices. Clark County established its coroner's office and set forth the coroner's duties and the procedures for coroner's inquests by enacting the Clark County, Nevada, Code of Ordinances (CCCO), Title 2, Chapter 2.12. Under the procedures set forth in this chapter, when an officer-

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[1]The parties have not included copies of this motion, the opposition thereto, and the reply in their joint appendix. Similarly, respondents submitted two supplemental filings related to this motion after the initial hearing at which the temporary restraining order was granted. The joint appendix, however, includes only three pages and two exhibits from one of those filings.

[2]In those counties that have not created a county coroner's office, the sheriff serves as the coroner, and any inquest is conducted according to statute. NRS 259.020; NRS 259.050.

involved death occurs, the coroner calls an inquest and a presiding officer is selected. CCCO § 2.12.080(c). An officer-involved death occurs when an officer, while acting in his or her official capacity, uses force that may contribute to the death of a person or the officer actively takes some role in causing a vehicular accident that leads to a person's death. CCCO § 2.12.010(p). An inquest is conducted when ''circumstances support reasonable grounds to suspect'' that a death was unnatural. CCCO § 2.12.010(c). As regards the presiding officer, ''the chief judge from the township where the death occurred shall appoint a qualified magistrate, as defined in section 2.12.010(l), to sit as the presiding officer in the inquest.'' CCCO § 2.12.020(e). A ''[q]ualified magistrate'' is defined as ''a justice of the peace from any jurisdiction within Clark County who is an attorney duly licensed to practice law in the state of Nevada.'' CCCO § 2.12.010(l). ''The presiding officer shall preside over the inquest and shall insure that the inquest is conducted as an investigatory and fact finding proceeding and not an adversarial proceeding.'' CCCO § 2.12.080(m).

Before the inquest, the coroner provides the presiding officer with a written overview of the case. CCCO § 2.12.080(f). Additionally, the presiding officer and the coroner compile copies of all records, exhibits, or other evidence that they determine to be relevant to the matter under investigation. CCCO § 2.12.080(i). The county prosecutor also assists the presiding officer with preparing for the inquest and works at the direction of the presiding officer, though in this role, the prosecutor serves as a neutral presenter of facts and not as an advocate for any interested parties. CCCO § 2.12.080(g). The presiding officer may appoint an inquest ombudsperson, who is a licensed lawyer in Nevada, to represent the deceased's family throughout the proceeding. CCCO § 2.12.010(r); CCCO § 2.12.075(a).

Another integral part of the proceeding is an inquest panel, which begins with 15 individuals who are selected by the Clark County jury commissioner. CCCO § 2.12.080(l). From this group, the presiding officer selects at random 7 persons to sit as the inquest panel. CCCO § 2.12.080(m). The presiding officer examines each person for bias, prejudice, or any other good and sufficient reason for dismissal and takes reasonable efforts to ensure that the panel is as diverse and representative of the community as possible. CCCO § 2.12.080(m)(1).

At the start of the inquest proceedings, the presiding officer makes an opening statement indicating that the inquest is not adversarial but is a fact-finding proceeding. CCCO § 2.12.080(m)(2). The presiding officer provides instruction to the inquest panel regarding their conduct outside the proceeding, CCCO § 2.12.080(m)(6), and prepares interrogatories that the in-

quest panel will answer regarding questions of fact. CCCO § 2.12.080(m)(7); CCCO § 2.12.100. The findings made pursuant to interrogatories do not bind the prosecutor's office or preclude any future civil or criminal proceedings. CCCO § 2.12.140. It is under these procedures that the coroner's inquest in question is to be conducted.

## *DISCUSSION*

[Headnote 1]

On appeal, appellants primarily argue that their due process rights under the Nevada Constitution will be violated if they are forced to participate in the coroner's inquest process under the procedures set forth in the Clark County, Nevada, Code of Ordinances for inquests involving officer-involved deaths. Appellants further contend that by designating justices of the peace to perform the duties of presiding officer in the coroner's inquest process, the Clark County Board of County Commissioners intruded upon the Nevada Constitution's express delegation of authority to the Legislature to establish the jurisdiction of the justices of the peace. We address these arguments in turn.[3]

### *Standard of review*

[Headnotes 2, 3]

In the absence of any factual dispute, this court reviews a district court's decision to grant or deny declaratory and injunctive relief de novo. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006); *see also Secretary of State v. Give Nevada A Raise*, 120 Nev. 481, 486 n.8, 96 P.3d 732, 735 n.8 (2004). In addition, this court reviews de novo determinations of whether a statute is constitutional. *Flamingo Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009).

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[3]This case is ripe for our review because the alleged harm is sufficiently concrete so as to yield an actual case or controversy. *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006) (noting that ''[w]hile harm need not already have been suffered, it must be probable for the issue to be ripe for judicial review''); *Matter of T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003) (''The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review.''). In this case, the inquest proceeding has already been initiated, and thus, as in *T.R.*, the application of the relevant code section to appellants is certain. Moreover, deferring ruling on the constitutional challenges at issue here will harm appellants, as they would be required to go through the inquest process without knowing the extent of any available due process protections and whether the individual presiding over the proceeding was constitutionally authorized to do so.

*The Clark County coroner's inquest proceeding does not infringe upon due process guarantees*

Under Nevada's due process clause, ''[n]o person shall be deprived of life, liberty, or property, without due process of law.'' Nev. Const. art. 1, § 8(5). Although appellants do not challenge the constitutionality of the Clark County code under the federal constitution, the similarities between the due process clauses contained in the United States and Nevada Constitutions, *Rodriguez v. Dist. Ct.*, 120 Nev. 798, 808 n.22, 102 P.3d 41, 48 n.22 (2004) (recognizing that ''[t]he language in Article 1, Section 8(5) of the Nevada Constitution mirrors the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution''), permit us to look to federal precedent for guidance as we determine whether the procedures utilized in the inquest proceedings regarding officer-involved deaths are consistent with the due process clause set forth in Article 1, Section 8(5) of the Nevada Constitution.

[Headnotes 4-7]

'' 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.'' *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *accord Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 199 (2005) (''What constitutes adequate [due process] procedure[s] varies depending on the circumstances of a particular case.''). The level of due process that must be provided in a particular government proceeding depends on the effect that the proceeding will have on a constitutionally protected interest. *Hannah*, 363 U.S. at 442. When a government agency is conducting proceedings, due process mandates that the protections afforded depend on whether the proceedings result in a binding adjudication or a determination of legal rights, in which case due process protections are greater. *Id.* Such protections, however, need not be made available in proceedings that merely involve fact-finding or investigatory exercises by the government agency. *Id.* Determining whether particular due process protections must be provided requires consideration of the constitutional interest at stake, the type of proceeding being conducted, and the potential that such protections will be unduly burdened by the proceeding. *Id.*

[Headnote 8]

Appellants assert that the inquest proceedings impliedly put their liberty and property interests at stake, as the proceedings involve an examination of their roles in causing a death to determine whether criminal laws have been violated in order to ''furnish the foundation for a criminal prosecution.'' They insist that the over-

all purpose of the inquest is to find them guilty of violating criminal laws and to brand them in public as criminals. To support this contention, appellants point out that a prosecutor participates in the inquest proceeding and that he or she has input on the witnesses to be called, how the inquest will be conducted, the scope of the issues, the scope of questioning, and the preparation of the interrogatories. Noting that the inquest ordinance allows both the deceased's family's attorney and the inquest ombudsperson to participate in the inquest process, appellants maintain that the deceased's family's attorney will seek to obtain admissions from them that can be used in any civil wrongful death action filed against them, and they argue that ''it defies rationality to assume that [his] prosecutorial zeal will not permeate the entire proceeding.''[4]

Respondents disagree with appellants' contentions and assert that there is no implication of due process protections where, as here, a government body does not determine any civil or criminal liability; does not make determinations depriving anyone of life, liberty, or property; and only serves to find facts that may subsequently be used as the basis for legislative or executive action.

*Federal precedent*

Our consideration of the due process issues presented by the parties focuses on three federal court decisions addressing similar

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[4]Appellants also argue that the inquest proceeding may be televised, CCCO § 2.12.080(k), with information made immediately available to the public, CCCO § 2.12.150, and that the damage that this may cause to their reputation, jobs, or future criminal prosecution violates their due process rights. Damage to one's reputation by itself is generally not a constitutionally protected interest. *See Paul v. Davis*, 424 U.S. 693, 711-12 (1976); *see also Hannah v. Larche*, 363 U.S. 420, 442-43 (1960) (rejecting arguments that reputational harm and the possibility of criminal prosecution require the provision of due process associated with adjudicatory proceedings when the proceeding at issue is investigatory in nature and stating that ''such collateral consequences . . . would not be the result of any affirmative determinations made by [the investigatory body] and they would not affect the legitimacy of [its] investigative function''). With regard to the impact of the inquest procedures on any subsequent criminal proceedings, any pretrial publicity caused by the inquest that results in prejudice in subsequent criminal proceedings may be remedied like any other pretrial activity resulting in publicity. *See State v. Roraff*, 159 N.W.2d 25, 30 (Wis. 1968) (finding that ''[i]t is not the source of pretrial publicity which determines the prejudice and the remedy but the nature, amount and the effect of such pretrial publicity''). The judicial system remedies the negative effects of prejudicial pretrial publicity by allowing for a change of venue or other remedial actions. *See, e.g.*, *Sicor, Inc. v. Sacks*, 127 Nev. 896, 902-03, 266 P.3d 618, 622 (2011) (expanding the multifactor test for determining whether there is a reason to believe that the party seeking a change of venue will not receive a fair trial based on pretrial publicity in the community where the case originated).

concerns to those posed by appellants. We begin by considering the United States Supreme Court's decision in *Hannah v. Larche*, 363 U.S. 420 (1960), in which the Court articulated the test for determining whether due process rights attach in a particular proceeding and concluded that those rights traditionally associated with adjudicatory proceedings do not attach in the context of an investigatory proceeding. We then turn to the Court's subsequent decision in *Jenkins v. McKeithen*, 395 U.S. 411 (1969), in which the *Hannah* test was applied to determine that due process rights do attach in the context of an adjudicatory proceeding. Lastly, instructional to our analysis is the United States Court of Appeals for the First Circuit's decision in *Aponte v. Calderon*, 284 F.3d 184 (1st Cir. 2002), which provides a well-reasoned discussion of the analysis in *Hannah* and *Jenkins* as it relates to determining whether due process rights are implicated in a particular proceeding.

First, in *Hannah*, the Supreme Court addressed due process challenges to rules of procedure adopted by the Commission on Civil Rights under the Fifth Amendment's Due Process Clause. 363 U.S. 420. The case arose out of the commission's investigation of alleged voting deprivations in Louisiana. *Id.* at 421. Registrars of voters and private citizens were called to appear before the commission. *Id.* at 421-22. These parties moved to enjoin the commission from conducting its hearing on the basis that the commission's rules protected the identity of the persons submitting the complaint and denied those summoned to testify from cross-examining the persons who filed the complaints or from calling any witnesses. *Id.* at 422. The Court considered the parties arguments that the commission's procedures might irreparably harm those being investigated by subjecting them to public disgrace or shame, the possibility of losing their jobs, and even criminal prosecution. *Id.* at 442-43. The Court noted that these arguments were conjecture, but the Court observed that ''even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function.'' *Id.* at 443.

Concluding that the requirements of due process vary with the type of proceeding involved, *id.* at 442, the Court noted that the civil rights commission's duties included investigating allegations that individuals have been discriminatorily deprived of the right to vote, studying and collecting information related to denials of equal protection of the laws, and reporting its findings and recommendations to the President and Congress. *Id.* at 440. From this information, the Court extrapolated that the commission's function was ''purely investigative and fact-finding'' because ''[i]t does not adjudicate. It does not hold trials or determine anyone's civil or

criminal liability. . . . Nor does it indict, punish, or impose any legal sanctions . . . [or] make determinations depriving anyone of his life, liberty, or property.'' *Id.* at 441. In sum, the Court concluded that ''[t]he only purpose of [the commission's] existence is to find facts which may subsequently be used as the basis for legislative or executive action.'' *Id.* Thus, the Court concluded that because the commission's role was investigatory, the commission's procedures did not violate the due process right of those challenging the commission's proceedings. *Id.* at 451.

Nearly a decade later, in *Jenkins v. McKeithen*, 395 U.S. 411 (1969), the Court applied the *Hannah* test to determine whether a Louisiana statute creating a body called the Labor-Management Commission of Inquiry ran afoul of, among other things, the Fourteenth Amendment's Due Process Clause. There, the commission was charged with investigating and determining whether probable cause existed regarding certain criminal law violations and making suggestions as to prosecution. *Id.* at 416-17. With regard to the proceedings, the commission had the authority to call witnesses. *Id.* at 417. And while the witnesses had the right to have counsel present and to offer advice, cross-examination was limited. *Id.* at 417-18.

At the outset, the *Jenkins* Court noted that the stated purpose of the commission at issue was to investigate and make findings of fact ''relating to violations or possible violations of criminal laws,'' *id.* at 414, and to supplement and assist the efforts of district attorneys and other law enforcement personnel. *Id.* at 414-15. The commission's authority was specifically limited to criminal violations, and it could not take action with regard to any strictly civil aspects of any labor problem. *Id.* at 415. Although its adjudication of any criminal violations was not binding and could ''not be used as prima facie or presumptive evidence of guilt or innocence in any court of law,'' the commission's findings could include conclusions with regard to specific individuals and it could make recommendations for future actions. *Id.* at 417. The Court noted that the commission was required to report its findings to the proper authorities ''if it finds there is probable cause to believe that violations of the criminal laws have occurred.'' *Id.*

Thus, in stark contrast to the investigatory agency at issue in *Hannah*, the *Jenkins* Court held that the commission ''very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws'' and ''to brand them as criminals in public.'' *Id.* at 427-28. Therefore, the Court held that based on the commission allegedly making ''an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commis-

sion to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights.'' *Id.* at 429.

Finally, in *Aponte v. Calderon*, 284 F.3d 184 (1st Cir. 2002), the United States Court of Appeals for the First Circuit synthesized the distinction between the investigatory proceedings addressed in *Hannah* and the adjudicatory proceedings discussed in *Jenkins* in resolving due process issues pertaining to a commission created by executive order of the Governor of Puerto Rico to address issues related to the use of public resources and government corruption. *Aponte*, 284 F.3d at 186, 191-95. The commission in *Aponte* was empowered to conduct investigations, make factual findings, and ultimately issue recommendations with regard to, among other things, ''further proceedings, either administrative, civil, or criminal, against certain persons.'' *Id.* at 187. The commission could not, however, initiate or file civil, criminal, or administrative charges or make adjudications of criminal liability or probable cause determinations. *Id.*

In examining the constitutionality of the executive order under *Hannah* and *Jenkins*, the *Aponte* court noted that the Supreme Court ''has steadfastly maintained [the] distinction between general fact-finding investigations,'' which do not implicate due process rights, ''and adjudications of legal rights'' for which due process concerns may be implicated. *Id.* at 192-93. Applying this analysis to the issues before it, the *Aponte* court concluded that without an adjudication of legal rights, due process rights are not triggered, and because the commission at issue there did not and could not adjudicate legal rights, no adjudication could occur, and thus, due process concerns were not triggered, even if the possibility existed that the investigations could lead to criminal prosecutions. *Id.* at 193-95.

*Clark County coroner's inquest*

[Headnote 9]

Turning to the present case, we note that the Clark County code provisions pertaining to the inquest procedures for officer-involved deaths fail to provide a clear statement of purpose. *See, e.g.*, *Jenkins*, 394 U.S. 416. The lack of an express purpose requires this court to review the relevant information in the code to assess the nature and function of the inquest proceeding and to glean from the delineation of the inquest duties and procedures, set forth in CCCO § 2.12.080, whether and to what extent due process protections are implicated. When the nature and function of the inquest proceedings are examined in light of the analyses set forth in *Hannah*, *Jenkins*, and *Aponte*, it becomes evident that the Clark County proceedings only serve a fact-finding and investigatory function be-

cause the proceedings do not result in an adjudication or determination of any of appellants' legal rights. The sole product of the inquest process are factual findings which, in and of themselves, are not binding or entitled to preclusive effect in any future proceeding.

Looking to the Clark County code, the inquest procedures require the presiding officer to ''insure that the inquest is conducted as an investigatory and fact finding proceeding and not an adversarial proceeding.'' CCCO § 2.12.080(m). Thus, the presiding officer must, among other things, make an opening statement indicating that the inquest is a fact-finding, rather than an adversarial, proceeding, CCCO § 2.12.080(m)(2), and must ''prepare the set of interrogatories for the inquest . . . [that] shall deal only with questions of fact and shall not deal with questions of fault or guilt.'' CCCO § 2.12.080(m)(7). Further, section 2.12.140, entitled ''Panel Interrogatories,'' spells out what the end result of the inquest proceeding will be. Under that section, ''[a]fter hearing the testimony, the inquest panel shall deliberate in secret and answer'' the interrogatories prepared pursuant to section 2.12.080(m)(7), which ''deal only with questions of fact and shall not deal with questions of fault or guilt.'' CCCO § 2.12.140(a). The findings made pursuant to these interrogatories, however, ''shall not be binding on the district attorney's office nor shall the findings have any preclusive effect in any future civil or criminal proceeding.'' *Id.*

These provisions, therefore, demonstrate that the inquest's function is ''purely investigative and fact-finding'' because no adjudication or determination of liability occurs. *Hannah*, 363 U.S. at 441. The inquest panel does not ''indict, punish, or impose any legal sanctions . . . [or] make determinations depriving anyone of his life, liberty, or property''; its ''only purpose . . . is to find facts which may subsequently be used as the basis for legislative or executive action.'' *Id.* And unlike the statutes at issue in *Jenkins*, the inquest panel is not authorized to make a recommendation to the district attorney or any other law enforcement body. *See generally* CCCO § 2.12.080 (setting forth the duties and procedures for the inquest); CCCO § 2.12.140(a) (addressing panel interrogatories). More importantly, however, in contrast to the probable cause determinations and findings of fact relating to violations or potential violations of criminal law made by the commission at issue in *Jenkins*, the interrogatories answered by the inquest panel in this case are specifically prohibited from dealing with questions of fault or guilt. CCCO § 2.12.080(m)(7); CCCO § 2.12.140(a).

Thus, under *Hannah*, *Jenkins*, and *Aponte*, the inquest process constitutes an investigatory, rather than an adjudicatory, proceed-

ing. As a result, due process protections are not triggered by the inquest process.[5]

Having concluded that the inquest at issue in this case is investigatory, rather than adjudicatory, our analysis goes no further. We therefore affirm that portion of the district court's order rejecting appellants' due process arguments. We now turn to whether, by involving justices of the peace in the inquest process, the Clark County Board of County Commissioners has unconstitutionally intruded on the Legislature's exclusive authority to determine the jurisdiction of the justices of the peace.

*Justices of the peace participation in the inquest process violates the Nevada Constitution*

[Headnote 10]

The Nevada Constitution expressly provides that only the Legislature has the authority to determine, by law, the jurisdictional limits of the justices of the peace. Specifically, Article 6, Section 8 of the Constitution states that the Legislature ''shall fix by law . . . the limits of [justices of the peace's] civil and criminal jurisdiction, according to the amount in controversy, the nature of the case, the penalty provided, or any combination of these.'' To that end, the Legislature enacted NRS 4.370(1), which provides that the justice courts are courts of limited jurisdiction and have only the authority granted to them by statute.[6] *See State of Nevada v. Justice Court*, 112 Nev. 803, 805, 919 P.2d 401, 402 (1996); *see also* NRS 4.170 (providing that justices of the peace shall be conservators of the peace in their respective townships and shall discharge such duties as may be prescribed by law).

Appellants contend that by providing for the participation of justices of the peace in the inquest process, the Clark County Board of County Commissioners unconstitutionally intruded on the Nevada Constitution's express delegation of power to the Legisla-

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[5]The United States District Court for the District of Nevada recently reached the same conclusion in addressing similar constitutional challenges to the Clark County inquest proceedings brought by police officers with the Las Vegas Metropolitan Police Department. *See Zaragoza v. Bennett-Haron*, No. 11-CV-01091-PMP-GWF, 2011 WL 6097754, *8-9 (D. Nev. Dec. 5, 2011) (concluding that the inquest was investigatory and did not adjudicate any legal rights and, thus, did not trigger the due process clause).

[6]The ACLU suggests that, under CCCO § 2.12, a justice of the peace is acting as a presiding officer of an investigatory body outside the purview of the justice court and is not acting with the authority of a justice court magistrate. The ACLU has pointed to no authority that allows an entity other than the Legislature to assign duties to the justices of the peace, judicial or otherwise; nonetheless, justices of the peace are appointed as presiding officers of the inquest by virtue of their positions as justices of the peace.

ture to determine the jurisdiction of the justices of the peace. Appellants recognize that the Legislature granted justices of the peace the authority to participate in inquest proceedings in certain circumstances. They assert, however, that certain statutory provisions regarding coroners set forth in NRS Chapter 259 do not apply in counties, like Clark County, where the county coroner is appointed. Respondents and the Nevada ACLU disagree, arguing, in essence, that NRS Chapter 259 should be viewed as authorizing justices of the peace to participate in inquest proceedings regardless of whether the coroner for a particular county is appointed.

''Every county in this State constitutes a coroner's district, except a county where a coroner is appointed pursuant to the provisions of NRS 244.163.'' NRS 259.010(1). In those counties without an appointed coroner, the sheriff serves as the de facto coroner. NRS 259.020. The Legislature has provided procedures for the sheriff to operate under in conducting an inquest, which includes the use of a justice of the peace:

> If an inquest is to be held, the district attorney shall call upon a justice of the peace of the county to preside over it. The justice of the peace shall summon three persons qualified by law to serve as jurors, to appear before the justice of the peace forthwith at the place where the body is or such other place within the county as may be designated by him or her to inquire into the cause of death.

NRS 259.050(4). The Legislature has alternatively provided that instead of using a sheriff as a coroner, a county may appoint a coroner. NRS 244.163(1). ''The boards of county commissioners in their respective counties may create by ordinance the office of the county coroner, prescribe the qualifications and duties of the county coroner and make appointments to the office.'' *Id*. If a county chooses to create a coroner's office, many of the statutory procedures, including the participation of a justice of the peace, do not apply. *See* NRS 259.010(2) (''The provisions of this chapter, except NRS 259.025 and 259.150 to 259.180, inclusive, do not apply to any county where a coroner is appointed pursuant to the provisions of NRS 244.163.''). Clark County has chosen to appoint a coroner and the county has therefore created its own code scheme for inquests. Under the Clark County code, only justices of the peace may serve as the presiding officer for officer-involved death inquest proceedings. *See* CCCO § 2.12.080(c) (providing that in cases involving officer-involved deaths, section 2.12.020(e) controls the selection of the presiding officer); CCCO § 2.12.020(e) (stating that ''[i]f the death is an officer involved death, the chief judge from the township where the death occurred shall appoint a qualified magistrate, as defined in Section 2.12.010(l), to sit as the presiding officer in the inquest''); CCCO

§ 2.12.010(l) (defining ''[q]ualified magistrate'' as ''a justice of the peace from any jurisdiction within Clark County who is an attorney duly licensed to practice law in the state of Nevada'').

[Headnotes 11-14]

When construing a statute, this court looks to the words in the statute to determine the plain meaning of the statute, and this court will not look beyond the express language unless it is clear that the plain meaning was not intended. *City of Reno v. Bldg. & Constr. Trades*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011); *see also Berkson v. LePome*, 126 Nev. 492, 497, 245 P.3d 560, 563 (2010) (holding that words in a statute will be given their plain meaning). If the statute is ambiguous, however, this court will ''look to the provision's legislative history and the . . . scheme as a whole to determine what the . . . framers intended.'' *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). ''Statutory language is ambiguous if it is capable of more than one reasonable interpretation.'' *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010). This court construes ''statutes to preserve harmony among them.'' *Canarelli v. Dist. Ct.*, 127 Nev. 808, 814, 265 P.3d 673, 677 (2011).

[Headnote 15]

In rejecting appellants' arguments that the code sections providing for the participation of justices of the peace in the inquest process unconstitutionally intrudes on the Legislature's authority, the district court concluded that, even though ''NRS 259.050 does not specifically apply to Clark County'' because it has an appointed coroner, the statutory language that permits justices of the peace to preside over inquests in some counties indicates that it is permissible for any county, including those with appointed coroners, to have a justice of the peace preside over the inquest process. We disagree.

Here, NRS 259.010(2) plainly provides that in counties with appointed coroners, NRS 259.050 does not apply. And when NRS 250.010(2) and NRS 259.050(4) are read together, *see Canarelli*, 127 Nev. at 814, 265 P.3d at 677 (noting that this court construes ''statutes to preserve harmony among them''), these statutes clearly authorize justices of the peace to participate in inquest proceedings only in counties where the county coroner is not appointed. Because Clark County has an appointed coroner, NRS 259.050(4) does not apply, and thus, justices of the peace are not authorized to participate in Clark County inquest proceedings.[7]

[7]While NRS 244.163 provides that the board of county commissioners will prescribe the duties of the county coroner, it makes no mention of prescribing the duties of any other actor, including justices of the peace. Thus, nothing in NRS 244.163 can be construed as authorizing the participation of justices of the peace in coroner's inquest proceedings in counties with appointed coroners.

NRS 259.010(2). To conclude otherwise would violate this court's well-established maxim that the expression of one thing is the exclusion of another. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967); *see also State, Dep't of Taxation v. DaimlerChrysler*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (stating that ''omissions of subject matters from statutory provisions are presumed to have been intentional'').

[Headnote 16]

Because the Nevada Constitution vests the Legislature with exclusive authority to determine the jurisdiction of justices of the peace, *see* Nev. Const. art. 6, § 8, by providing for the participation of justices of the peace in Clark County's inquest proceedings related to officer-involved deaths, the Clark County Board of County Commissioners has unconstitutionally impinged on the Legislature's constitutionally delegated authority. As a result, based on our de novo review of the district court's decision, we conclude that the district court erred in rejecting appellants' declaratory relief claim as to this issue. *See Canarelli*, 127 Nev. at 813, 265 P.3d at 676 (stating that the district court's conclusions of law, including statutory interpretations, are reviewed de novo); *Flamingo Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (stating that this court reviews de novo determinations of whether a statute is constitutional); *Nevadans for Nevada v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006) (providing that in the absence of any factual dispute, this court reviews a district court's decision to grant or deny declaratory and injunctive relief de novo). As we conclude that CCCO § 2.12.010(1) violates Nevada's Constitution by including justices of the peace in inquest proceedings related to officer-involved deaths, we must determine whether the remaining portions of the code may stand.

*The offending coroner's inquest provisions must be severed*

[Headnote 17]

This court has adopted a test for severability, pursuant to which a statute is severable only ''if the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed.'' *Flamingo Paradise Gaming*, 125 Nev. at 514-18, 217 P.3d at 555-57 (addressing the severability of a statute enacted by ballot measure).

[Headnote 18]

By Ordinance 3920, the sections of Chapter 2.12 of the Clark County code at issue in this case were amended. Although the actual ordinance contained a severability clause, no such clause was

codified or included in Chapter 2.12 of the code. In Nevada counties, ordinances are passed by bill. NRS 244.095. When an ordinance is amended, each section of the previously existing ordinance is replaced by the corresponding section of the newly enacted ordinance. *Id.* Additionally, when a county codifies its ordinances into a county code, the ordinances are to be arranged in chapters and sections. NRS 244.116(2). In Clark County, the general ordinances of the county have been codified and are published together as the Clark County, Nevada, Code of Ordinances. CCCO § 1.01.010; *see* NRS 244.116 (permitting each Nevada county's board of commissioners to provide for the codification and publication of the county's general ordinances in a county code). Thus, although the severance clause is contained in the ordinance enacted by the board of county commissioners, but has not been codified in the county code, we will nonetheless consider the severance clause in determining whether an unconstitutional portion of the code enacted by that ordinance can be severed. *Cf. Picetti v. State*, 124 Nev. 782, 793-94, 192 P.3d 704, 712 (2008) (considering the effective date of a bill, which was not codified in the resulting statute, in order to determine whether the Legislature intended for the bill to apply retroactively).

[Headnote 19]

It appears from the inclusion of the severability clause, as Section 13 of Ordinance 3920, that the Clark County Board of County Commissioners intended for the remainder of the code sections amended by Ordinance 3920 to stay in effect if any part of the code amended by that ordinance was struck down as unconstitutional. Here, the only language providing for justices of the peace to serve in the inquest process is CCCO § 2.12.010(l), which defines ''qualified magistrate'' as ''a justice of the peace from any jurisdiction within Clark County who is an attorney duly licensed to practice law in the state of Nevada.'' For cases regarding officer-involved deaths, however, the code provides no alternative to justices of the peace serving as presiding officers. Notably, under CCCO §§ 2.12.080(c) and 2.12.020(e), a qualified magistrate—which must be a justice of the peace under CCCO § 2.12.010(l)—must be appointed to serve as presiding officer in inquests investigating officer-involved deaths. Thus, striking down only CCCO § 2.12.010(l) would render the entire inquest scheme for officer-involved deaths ineffective, as such proceedings could not go forward without a presiding officer. We therefore conclude that the remaining portions of the officer-involved inquest scheme cannot, standing alone, be given legal effect and, as a result, the entire inquest scheme for officer-involved deaths necessarily must be struck down. *Flamingo Paradise Gaming*, 125 Nev. at 514-18, 217 P.3d at 555-57.

*CONCLUSION*

The Clark County, Nevada, Code of Ordinances provisions establishing and setting forth the inquest procedures for officer-involved deaths do not implicate appellants' due process rights. We conclude, however, that to the extent that the code provisions pertaining to inquest proceedings regarding officer-involved deaths require that the presiding officer be a justice of the peace, these provisions unconstitutionally intrude upon the Legislature's exclusive constitutional authority to determine the jurisdiction of justices of the peace. And because, in the case of officer-involved deaths, the code makes no provision for anyone except a justice of the peace to serve as presiding officer, we conclude that the entire inquest scheme for officer-involved deaths necessarily fails.[8] Accordingly, we reverse the district court's decision.[9]

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, PICKERING, and PARRAGUIRRE, JJ., concur.

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ADRIAN JACKSON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 53632

STEVE GARCIA, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 55086

December 6, 2012 291 P.3d 1274

Appeals from district court judgments of conviction based on similar questions regarding double jeopardy and redundancy. Eighth Judicial District Court, Clark County; Valerie Adair, Judge (Docket No. 53632); Second Judicial District Court, Washoe County; Jerome Polaha, Judge (Docket No. 55086).

In Docket No. 53632, defendant was convicted in the Eighth Judicial District Court of attempted murder, assault, and battery, all with a deadly weapon, robbery, kidnapping, burglary, and discharge of a firearm in a building. Defendant appealed. In Docket No. 55086, defendant was convicted in the Second Judicial District Court of murder, two counts of attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon causing

[8]Based on our resolution of this matter, it is not necessary to address the parties' remaining appellate arguments.

[9]We vacate the stay of the coroner's inquest proceedings imposed by our May 10, 2012, order.

substantial bodily harm, and battery with the use of a deadly weapon. Defendant appealed. The supreme court, PICKERING, J., held that: (1) defendants' convictions for attempted murder, assault with a deadly weapon, and battery with a deadly weapon did not violate double jeopardy, disapproving *Salazar v. State*, 119 Nev. 224, 70 P.3d 749 (2003); *Skiba v. State*, 114 Nev. 612, 959 P.2d 959 (1998); *Albitre v. State*, 103 Nev. 281, 738 P.2d 1307 (1987); and (2) defendants' convictions for attempted murder and aggravated battery did not violate double jeopardy.

**Affirmed.**

*Philip J. Kohn*, Public Defender, and *P. David Westbrook*, Deputy Public Defender, Clark County, for Appellant Jackson.

*Karla K. Butko*, Verdi, for Appellant Garcia.

*Catherine Cortez Masto*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Nancy A. Becker*, Deputy District Attorney, Clark County, for Respondent in Docket No. 53632.

*Catherine Cortez Masto*, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent in Docket No. 55086.

1. SENTENCING AND PUNISHMENT.
   Multiple consecutive sentences of life imprisonment and specific terms of years on defendant's attempted murder, robbery, and kidnapping convictions, with consecutive additional terms for weapon enhancements, and lesser concurrent sentences for his assault, battery, and other convictions did not constitute cruel and unusual punishment, as the sentences imposed were within the statutory limits, defendant did not demonstrate that the applicable statutes were unconstitutional, and the sentences were not so grossly disproportionate to the offenses as to shock the conscience. U.S. CONST. amend. 8.
2. DOUBLE JEOPARDY.
   Whether conduct that violates more than one criminal statute can produce multiple convictions in a single trial without violating double jeopardy is essentially a question of statutory construction, albeit statutory construction with a constitutional overlay. U.S. CONST. amend. 5.
3. CRIMINAL LAW.
   The supreme court's review of an issue of statutory construction is de novo.
4. CRIMINAL LAW.
   The supreme court's review of constitutional issues is de novo.
5. DOUBLE JEOPARDY.
   The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. Const. art. 1, § 8; U.S. CONST. amend. 5.

6. DOUBLE JEOPARDY.
   It is presumed that where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense. Const. art. 1, § 8; U.S. CONST. amend. 5.
7. DOUBLE JEOPARDY.
   For double jeopardy purposes, to determine whether two statutes penalize the same offense, the court inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. Const. art. 1, § 8; U.S. CONST. amend. 5.
8. DOUBLE JEOPARDY.
   If Congress or a state legislature has clearly authorized multiple punishments for the same offense, as routinely occurs when a statute authorizes incarceration and a fine for a given crime, dual punishments do not offend double jeopardy, even though they are imposed for the same offense. Const. art. 1, § 8; U.S. CONST. amend. 5.
9. DOUBLE JEOPARDY.
   If Congress or a state legislature has created mutually exclusive alternative offenses, thereby prohibiting multiple punishment for what are separate offenses, that prohibition controls. Const. art. 1, § 8; U.S. CONST. amend. 5.
10. DOUBLE JEOPARDY.
    With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. Const. art. 1, § 8; U.S. CONST. amend. 5.
11. DOUBLE JEOPARDY.
    Defendant's convictions for attempted murder, assault with a deadly weapon, and battery with a deadly weapon did not violate double jeopardy, as each offense contained an element not contained in the other; attempted murder required intent to kill, malice aforethought, and failure to complete the crime of murder, none of which were elements of battery or assault, disapproving *Salazar v. State*, 119 Nev. 224, 70 P.3d 749 (2003); *Skiba v. State*, 114 Nev. 612, 959 P.2d 959 (1998); *Albitre v. State*, 103 Nev. 281, 738 P.2d 1307 (1987). Const. art. 1, § 8; U.S. CONST. amend. 5; NRS 193.330, 200.010, 200.481.
12. DOUBLE JEOPARDY.
    Defendants' convictions for attempted murder and aggravated battery did not violate double jeopardy, as each offense contained an element not contained in the other; attempted murder required intent to kill, malice aforethought, and failure to complete the crime of murder, none of which were elements of battery. Const. art. 1, § 8; U.S. CONST. amend. 5; NRS 193.330, 200.010, 200.481.
13. CRIMINAL LAW.
    There is a two-part test to determine whether the State's failure to gather evidence caused injustice; first, the court considers whether the uncollected evidence was material, and, second, if the evidence was material, the court must determine whether the failure to gather evidence was the result of negligence or bad faith.
14. CRIMINAL LAW.
    Omitted portions of videotape from bar's surveillance system that bar provided to police were not material, nor was decision to have bar compile only parts of surveillance recordings made in bad faith, and thus, State's failure to obtain entire videotape caused defendant no injustice, in prosecution for attempted murder and other offenses; defendant suggested that alleged accomplice was complicit in the robbery and that the

omitted footage might somehow prove that, but the State provided all video footage that featured accomplice and defendant, including footage of their interaction before and during the robbery, and decision to compile only parts of videotape appeared to be a concern for efficacy, not bad faith.

15. CRIMINAL LAW.

When seeking dismissal of charges based on State's failure to gather evidence, which requires defendant to show that the evidence was material, ''material evidence'' is such that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different.

16. CRIMINAL LAW.

The district court's error in reviewing defendant's motion to dismiss for State's failure to gather evidence was harmless, in prosecution for attempted murder and other offenses, as the district court considered the materiality of the evidence and the possibility of bad faith and ultimately reached the right conclusion.

Before the Court EN BANC.

## OPINION

By the Court, PICKERING, J.:

A single act can violate more than one criminal statute. When it does, the question arises whether the defendant can, in a single trial, be prosecuted and punished cumulatively for that act. These appeals present specific applications of that question: When the elements of both crimes are met, can a defendant who shoots and hits but fails to kill his victim be convicted of and punished for both attempted murder and battery? If he shoots and misses, can he be convicted of and punished for both attempted murder and assault?

In general, the answer to the single act/multiple punishment question depends on the statutes violated, specifically, whether they proscribe the same offense and, if so, whether they nonetheless authorize cumulative punishment. The statutes' elements define how many distinct crimes have been created. If each statute contains an element that the other does not, then the offenses are different. Battery, assault, and attempted murder each includes elements the others do not. Furthermore, Nevada's attempt statute authorizes cumulative punishment in the attempted murder/assaultive crime context. We therefore affirm the judgments of conviction in both appeals.

### I.

*Jackson v. State (Docket No. 53632)*

The facts relevant to Adrian Jackson's appeal are these: James Duffy was working the night shift at Foot Hills Tavern when Jack-

son, then just 17 years old, entered. After 20 minutes of conversation, Jackson showed Duffy a gun and said he intended to rob the bar. He then coerced Duffy into helping him try to disable the bar's security cameras.

During the robbery, Jackson forced Duffy into the restroom, ordered him into a submissive position, and asked him if he had ever taken a bullet. When Duffy said no, Jackson asked him whether he would rather be shot in the leg, the stomach, or the head. Duffy chose to be shot in the leg, which Jackson proceeded to do.

Next, Jackson asked Duffy whether he would rather be shot in the chest or the head. Duffy responded that he would rather be shot in the chest. Jackson told Duffy to lift up his head and close his eyes. Before Jackson fired, Duffy got to his feet and, despite his injured leg, grabbed the gun barrel. Jackson shot but the bullet discharged over Duffy's head. The two men struggled, Jackson fled, and Duffy called the police.

As part of their investigation, police officers contacted Mark Rodney, who managed the bar's surveillance system. Rodney advised that the security cameras had survived Jackson's bungled attempt to disable them, and offered to provide complete video for the evening. The police declined and instead asked Rodney to prepare a composite video, including only frames that showed Duffy or Jackson. The composite video omitted 12 to 15 hours of recordings from the bar's several security cameras.

An anonymous tip led to Jackson's arrest. He was charged with seven felonies, including attempted murder, assault, and battery, all with a deadly weapon; robbery, kidnapping, burglary, and discharge of a firearm in a building. When Jackson learned at trial about the discarded video, he moved for a mistrial, which the district court denied. The jury convicted Jackson on all counts. The district court sentenced Jackson to multiple consecutive sentences of life imprisonment and specific terms of years on the attempted murder, robbery, and kidnapping counts, with consecutive additional terms for the weapon enhancements, and lesser concurrent sentences for his assault, battery, and other convictions.

[Headnote 1]

On appeal, Jackson argues that his convictions for assault and battery, on top of his attempted murder conviction, violate double jeopardy and are redundant to the attempted murder conviction and to each other. Jackson also argues that the State's failure to preserve the complete video footage offends due process, and that his sentence constitutes cruel and unusual punishment.[1]

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[1]Jackson's cruel and unusual punishment argument is without merit because the sentences imposed are within the statutory limits, Jackson has not demonstrated that the applicable statutes are unconstitutional, and the sentences are

*Garcia v. State (Docket No. 55086)*

Appellant Steve Garcia and several friends got into a street fight with brothers Isaac, Ricardo, and Jose Guadalupe ''Lupe'' Cordero. Garcia drew a gun and fired separate shots at Isaac and Lupe, hitting both. When Garcia and his friends fled by car, Ricardo gave chase. Garcia turned and again fired the gun, hitting Ricardo in the foot. Lupe died, and Isaac suffered severe injuries.

In a single trial, Garcia was tried for and convicted of Lupe's murder, two counts of attempted murder with the use of a deadly weapon for shooting Isaac and Ricardo, battery with the use of a deadly weapon causing substantial bodily harm (Isaac), and battery with the use of a deadly weapon (Ricardo). The court sentenced Garcia to life in prison with the possibility of parole for Lupe's murder, to consecutive sentences of 192 months in prison for the two attempted murder convictions, and to lesser concurrent sentences for the aggravated battery convictions.

Garcia raises myriad issues on appeal, only one of which warrants extended discussion: that his convictions for attempted murder and aggravated battery violate double jeopardy and are impermissibly redundant.[2]

II.

[Headnotes 2-4]

Whether conduct that violates more than one criminal statute can produce multiple convictions in a single trial is essentially a question of statutory construction, albeit statutory construction with a constitutional overlay. *See United States v. McLaughlin*, 164 F.3d 1, 7-8 (D.C. Cir. 1998). Our review is de novo as to both the statutory construction, *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (whether leaving three victims at the scene of an accident constituted one offense or three presents a statutory construction question that receives de novo review), and constitutional issues involved, *Davidson v. State*, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008) (''A claim that a conviction violates the Double Jeopardy Clause generally is subject to de novo review on ap-

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not so grossly disproportionate to the offenses as to shock the conscience. *See Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion); *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

[2]Garcia also contends that: (1) the district court improperly instructed the jury, (2) the State committed misconduct during closing argument, (3) the district court improperly admitted testimony about gangs, (4) the murder sentence rested on suspect evidence resulting in cruel and unusual punishment, and (5) the evidence was insufficient to convict. After careful consideration, we conclude that these arguments lack merit. Garcia also contends that he was deprived of his right to effective assistance of counsel, an issue inappropriate for direct appeal. *Ouanbengboune v. State*, 125 Nev. 763, 768 n.1, 220 P.3d 1122, 1125 n.1 (2009).

peal.''). *See Ebeling v. State*, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (reviewing de novo a redundancy challenge to multiple convictions for an assertedly single offense).

A.

1.

[Headnote 5]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall ''be subject for the same offence to be twice put in jeopardy of life or limb.'' This protection applies to Nevada citizens through the Fourteenth Amendment to the United States Constitution, *Benton v. Maryland*, 395 U.S. 784, 794 (1969), and is additionally guaranteed by the Nevada Constitution, Nev. Const. art. 1, § 8. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). It is the third protection that is at issue in these appeals.

[Headnotes 6, 7]

''In accord with principles rooted in common law and constitutional jurisprudence,'' the Supreme Court ''presume[s] that 'where two statutory provisions proscribe the ''same offen[c]e,'' ' a legislature does not intend to impose two punishments for that offense.'' *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (quoting *Whalen v. United States*, 445 U.S. 684, 691-92 (1980)) (interpreting federal legislation). To determine whether two statutes penalize the ''same offence,'' both the Supreme Court and this court look to *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Ball v. United States*, 470 U.S. 856, 861 (1985) (''This Court has consistently relied on the test of statutory construction stated in *Blockburger*[ ] to determine whether Congress intended the same conduct to be punishable under two criminal provisions.''); *Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) (''Nevada utilizes the *Blockburger* test to determine whether separate offenses exist for double jeopardy purposes.''). The *Blockburger* test ''inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.'' *United States v. Dixon*, 509 U.S. 688, 696 (1993); *see Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001) (''under *Blockburger*, if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy

Clause prohibits a conviction for both offenses''), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

[Headnotes 8-10]

As *Rutledge*'s reference to ''presume[d]'' legislative intent suggests, the *Blockburger* test does not, by itself, decide whether multiple punishments are permissible. It determines whether the statutes violated penalize the same or several distinct offenses, and if so, whether a presumption arises against cumulative punishment. If Congress or a state legislature has clearly authorized multiple punishments for the same offense—as routinely occurs when a statute authorizes incarceration *and* a fine for a given crime—dual punishments do not offend double jeopardy, even though they are imposed for the ''same offence.'' *See Whalen*, 445 U.S. at 688-89 (but noting that, ''if a penal statute instead provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution'' (citing *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873))). The converse also holds: If Congress or a state legislature has created mutually exclusive alternative offenses, thereby prohibiting multiple punishment for what are separate offenses under *Blockburger*, that prohibition controls. *McLaughlin*, 164 F.3d at 9 (''Just as failing *Blockburger* does not preclude punishment under multiple provisions, passing *Blockburger* does not mandate it.''); *cf. Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (since NRS 201.230 makes ''[t]he crimes of sexual assault and lewdness . . . mutually exclusive[,] . . . convictions for both based upon a single act cannot stand''). In sum, ''[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'' *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).[3]

2.

Applying this law to these appeals, we turn to the statutes that produced the convictions Jackson and Garcia challenge.

NRS 193.330 is Nevada's attempt statute and it states:

> 1. An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit

[3]Some suggest that the prohibition against multiple punishment is not ''a freestanding constitutional prohibition implicit in the Double Jeopardy Clause,'' but rather, ''an aspect of the Due Process Clause requirement of legislative authorization.'' *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 801 (1994) (Scalia, J., joined by Thomas, J., dissenting).

> that crime. A person who attempts to commit a crime, unless a different penalty is prescribed by statute, shall be punished as follows:
>
> (a) If the person is convicted of:
>
> (1) Attempt to commit a category A felony, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years.
>
> . . . .
>
> 2. *Nothing in this section protects a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed.* A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court in its discretion discharges the jury and directs the defendant to be tried for the crime itself.

(Emphasis added.)

NRS 200.010(1) defines ''[m]urder'' as the ''unlawful killing of a human being . . . [w]ith malice aforethought,'' while NRS 200.030 deems murder a category A felony. NRS 193.165 provides an additional penalty for use of a firearm or deadly weapon. Jackson and Garcia were both convicted of attempted murder with use of a deadly weapon, a category B felony by operation of NRS 193.330(1)(a) and NRS 200.030. In addition, Jackson was convicted of assault and battery, each with a deadly weapon, and Garcia was convicted of battery with a deadly weapon causing substantial bodily harm for Isaac's shooting and battery with a deadly weapon for Ricardo's shooting.

Jackson was charged with assault under NRS 200.471(1)(a) that, as written at the time, *see infra* note 5, defined assault as ''intentionally placing another person in reasonable apprehension of immediate bodily harm,'' 2007 Nev. Stat., ch. 515, § 71, at 3078, a category B felony if committed with use of a deadly weapon. NRS 200.471(2)(b). Battery is ''any willful and unlawful use of force or violence upon the person of another,'' a category B felony if a deadly weapon is used. NRS 200.481(1)(a), (2)(e).

In determining whether the Legislature has authorized multiple punishments, we look first to statutory text. NRS 193.330(2), by its terms, authorizes conviction of and punishment for attempted murder in tandem with assault and/or battery: ''Nothing in this section protects a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed.'' Perhaps ''unsuccessful attempt to commit one crime'' means a failed attempt at attempt, but this seems implausible given

NRS 193.330(1), which defines attempt in terms of ''[a]n act done with the intent to commit a crime, and tending *but failing* [*i.e.*, 'unsuccessful attempt'] to accomplish it.'' (Emphasis added.) If NRS 193.330(2) expressly authorizes punishment for both attempted murder (the ''unsuccessful attempt to commit one crime'') and assault and/or battery (''the crime[s] actually committed''), the double jeopardy analysis ends there: The Legislature has authorized cumulative punishment. *See Hunter*, 459 U.S. at 366. While a court may take into account the aggregation of charges in sentencing—as both district courts did here when they ran the assault and battery sentences concurrent to the attempted murder sentences—the multiple convictions and associated punishments do not offend double jeopardy.

[Headnotes 11, 12]

But the parties do not argue NRS 193.330(2), so we move on to *Blockburger*, on which they focus. Under *Blockburger*, Jackson's and Garcia's multiple punishment challenges fail because ''each offense contains an element not contained in the other.'' *Dixon*, 509 U.S. at 696; *Barton*, 117 Nev. at 692, 30 P.3d at 1107. Attempted murder requires intent to kill, malice aforethought, and failure to complete the crime of murder, none of which are elements of battery or assault. NRS 193.330; NRS 200.010. Battery requires unlawful ''use of force or violence upon the person of another,'' *i.e.*, physical contact, which attempted murder does not. NRS 200.481. And murder can be attempted secretly, with the intent—indeed, the hope—that the victim will never apprehend danger; assault as charged in Jackson punishes the opposite. Therefore, the statutes do not proscribe the ''same offence,''[4] and the presumption against multiple punishments for the ''same offence'' does not arise, defeating Jackson's and Garcia's double jeopardy challenges.[5]

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[4]Of note, Garcia's trial counsel conceded this point at sentencing: ''I would love it if they actually legally merged [but] I believe there are elements that are different in the two [attempted murder and battery].''

[5]We acknowledge that the court held in *Walker v. State*, 110 Nev. 571, 574-75, 876 P.2d 646, 648 (1994), *overruled in part on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006), that assault with a deadly weapon is a lesser-included offense of attempted murder with the use of a deadly weapon. At that time, NRS 200.471(1)(a) defined assault as ''an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.'' NRS 200.471(1)(a) (1994). This is no longer the definition of assault, as the statute was amended in 2001. *See* 2001 Nev. Stat., ch. 216, § 1, at 986 (amending NRS 200.471(1)(a) to define assault as ''intentionally placing another person in reasonable apprehension of immediate bodily harm''). Although the statute was amended again in 2009 to add an alternative means of committing the offense, *see* 2009 Nev. Stat., ch. 37, § 1, at 74 (amending NRS 200.471(1)(a) to provide that assault may also be committed by ''[u]nlawfully attempting to use physical force against another person''), that version of the statute is not at issue here as Jackson was charged with an

B.

Jackson and Garcia argue that their multiple convictions violate Nevada's unique redundancy doctrine, even if they do not offend double jeopardy. Specifically, they maintain that under Nevada redundancy case law, multiple convictions *factually* based on the same act or course of conduct cannot stand, even if each crime contains an element the other does not. This argument, and the cases cited in its support, are fundamentally inconsistent with *Barton*, 117 Nev. at 693, 30 P.3d at 1107, where this court, sitting en banc, rejected the fact-driven ''same conduct'' approach in favor of *Blockburger*'s ''same elements'' approach. Based on *Barton*, we reject Jackson's and Garcia's redundancy challenges.

1.

Like Nevada, the United States Supreme Court has vacillated on whether to pursue, in addition to *Blockburger*'s ''same elements'' test, a ''same conduct'' analysis in assessing cumulative punishment. Thus, in *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by United States v. Dixon*, 509 U.S. 688 (1993), the defendant pleaded guilty to driving under the influence, a misdemeanor traffic violation, and later faced vehicular manslaughter charges arising from the same incident. *Id.* at 511-13. The Supreme Court held that the Double Jeopardy Clause barred the second prosecution ''in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.'' *Id.* at 521. Shortly after *Grady*, the Court made a large exception for cases where a single transaction or occurrence supported a charge of conspiracy and related substantive offenses. *United States v. Felix*, 503 U.S. 378 (1992). Then, a mere three years after *Grady*, the Court overruled it outright, reasoning that *Grady* was ''not only wrong in principle; it has already proved unstable in application.'' *Dixon*, 509 U.S. at 709; *id.* at 711 & n.16 (noting the multiple authorities criticizing *Grady* because it ''contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and ha[d] produced 'confusion.' '' (quoting *Solorio v. United States*, 483 U.S. 435, 439, 442, 450 (1987))).

In *Barton*, this court retraced the Supreme Court's path in *Grady* and *Dixon* and endorsed *Dixon*'s ''same elements'' approach, to the exclusion of *Grady*'s ''same conduct'' approach.

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offense that was committed before that amendment. Given the 2001 amendment that applies here, the holding in *Walker* is not controlling. *Walker* also relied on *Graves v. Young*, 82 Nev. 433, 420 P.2d 618 (1966), which, as discussed *infra* at note 7, is inconsistent with and overruled by *Barton*, 117 Nev. at 694-95, 30 P.3d at 1108-09.

*Barton*, 117 Nev. at 694-95, 30 P.3d at 1108. Although *Barton* arose in the context of lesser-included-offense instructions, *id.* at 687, 30 P.3d at 1103,[6] its stated holding applies to other contexts as well, including specifically, to questions of ''whether the conviction of a defendant for two offenses violates double jeopardy,'' ''whether a jury finding of guilt on two offenses was proper,'' and ''whether two offenses merged.'' *Id.* at 689-90, 30 P.3d at 1105. Indeed, the principal ''same conduct'' case *Barton* overrules, *Owens v. State*, 100 Nev. 286, 680 P.2d 593 (1984), is a double jeopardy/cumulative punishment case.[7] And *Barton* states its holding categorically: ''To the extent that our prior case law conflicts with the adoption of the elements test, we overrule *Owens v. State* and expressly reject the same conduct approach *that has been used in various contexts*''; ''[j]ust as the United States Supreme Court found [*Grady*'s] same conduct test to be unworkable . . . , we too conclude that *eliminating the use of this test* will promote mutual fairness.'' *Barton*, 117 Nev. at 694-95, 30 P.3d at 1108-09 (emphases added).

2.

The ''same conduct'' test that *Barton* rejects resurfaced not two years later in *Salazar v. State*, 119 Nev. 224, 70 P.3d 749 (2003), a redundancy decision on which both Jackson and Garcia rely. In *Salazar*, a three-judge panel of this court reversed a conviction under NRS 200.481(2)(e)(2) of battery with the use of a deadly weapon causing substantial bodily harm as redundant to a conviction of mayhem with a deadly weapon under NRS 200.280 and NRS 193.165. *Id.* at 228, 70 P.3d at 751-52. Factually, both con-

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[6]Barton was convicted of second-degree murder; he claimed that, on the evidence presented, reckless driving causing substantial bodily harm was a lesser included offense and that counsel had been remiss in not requesting a lesser-included-offense instruction to that effect.

[7]In overruling *Owens*, *Barton* also overrules the cases on which *Owens* relied—*Graves v. Young*, 82 Nev. 433, 420 P.2d 618 (1966), and *Dicus v. District Court*, 97 Nev. 273, 625 P.2d 1175 (1981). In *Owens*, this court reversed a battery conviction on double jeopardy grounds, holding that, while battery is not always a lesser included offense of robbery, the two stand in that relation when factually based on the same conduct or act. *Owens*, 100 Nev. at 288-89, 680 P.2d at 595 (citing *Graves* and *Dicus*). *Graves* held that ''[a]ttempted murder can be committed with or without assault'' and that whether assault was a lesser included offense of attempted murder depended on the ''evidence submitted at the trial, as well as . . . the language of the charge contained in the indictment.'' *Graves*, 82 Nev. at 438, 420 P.2d at 620-21 (quotations omitted). *Dicus* held that ''[w]hether battery with the use of a deadly weapon is a lesser included offense within attempted murder depends on the facts of each case.'' *Dicus*, 97 Nev. at 275-76, 625 P.2d at 1177. These cases, had *Barton* not overruled them, would have directly supported Jackson's and Garcia's redundancy challenges; they involved the same statutes and the same fact-based ''same conduct'' analysis Jackson and Garcia urge.

victions derived from a single act: cutting the victim with a box cutter. *Id*. Citing *Blockburger* and without any textual analysis, the panel determined that the two statutes did not penalize the same offense. *Id*. at 227, 70 P.3d at 751. But no matter. Drawing on pre-*Barton* cases, *Salazar* concluded that because the battery and mayhem convictions ''arise from and punish the same illegal act,'' *id*. at 228, 70 P.3d at 752 (citing *Skiba v. State*, 114 Nev. 612, 959 P.2d 959 (1998)), their ''gravamen'' is the same. *Id*. *Salazar* then adds that, '' '[t]he Legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire,' '' *id*. (quoting *Albitre v. State*, 103 Nev. 281, 284, 738 P.2d 1307, 1309 (1987)), and with this, its analysis ends: Battery conviction reversed.

One of the pre-*Barton* cases cited in *Salazar*, *Skiba*, involves similar facts and exhibits the same conclusory analysis as *Salazar*. Skiba slashed his victim's cheek and eye with a broken beer bottle, for which he was charged with and convicted of one count of battery ''not committed with a deadly weapon [resulting in] substantial bodily harm'' under NRS 200.481(2)(b) and of one count of battery ''committed with the use of a deadly weapon'' under NRS 200.481(2)(e). 114 Nev. at 613, 959 P.2d at 960. The court reversed the former conviction as ''redundant'' to the latter. *Id*. at 616, 959 P.2d at 961. As in *Salazar*, it did so without any analysis of statutory text, simply declaring the ''gravamen'' of both offenses to be the same and invoking *Albitre*'s ''adorn[ed in] chameleonic attire'' hyperbole. *Id*. at 615-16, 959 P.2d at 961.

Careful statutory analysis would have led to the same result in *Skiba* and arguably *Salazar*,[8] without resort to *Albitre*'s colorful

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[8]Nevada is unusual in retaining the anachronistic crime of mayhem, in addition to aggravated battery, in its criminal code. Wayne R. LaFave, *Criminal Law* § 16.5(b) at 887 (5th ed. 2010) (''Only a few of the modern codes contain such a crime [mayhem], although some others define a certain variety of aggravated battery in terms that are very similar.''). NRS 200.280 defines mayhem as ''unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless'' as by ''cut[ting] out or disabl[ing] the tongue, put[ting] out an eye, slit[ting] the nose, ear or lip, or disabl[ing] any limb or member of another, or voluntarily, or of purpose, put[ting] out an eye.'' The injury must be permanent; if not, ''no conviction for maiming [mayhem] shall be had, but the defendant may be convicted of assault in any degree.'' NRS 200.300. (NRS 200.300 has been carried forward without change from Nevada's 1911 criminal code; it was not until 1971 that the Legislature distinguished assault from battery as it does in NRS 200.471 and NRS 200.481. *See* 1971 Nev. Stat., ch. 612, §§ 1-4, at 1384-85.) Because mayhem has historically been treated as an aggravated form of battery, 3 William Blackstone, Commentaries *115, *121; Annotation, *Mayhem as Dependent on Part of Body Injured and Extent of Injury*, 16 A.L.R. 955 (1922), a fair reading of NRS 200.280 and 193.165, on the one hand, and NRS 200.481(2)(e)(2), on the other, especially given NRS 200.300, is that the Legislature authorized conviction of mayhem or battery causing substantial bodily harm, but not both.

but ultimately unhelpful ''chameleonic attire'' language or the discredited ''same conduct'' approach it camouflages. Overlooked in *Skiba* is the fact that, by its terms, NRS 200.481 made the two offenses with which Skiba was charged mutually exclusive, statutory alternatives. Thus, for Skiba to have been convicted under NRS 200.481(2)(b), the jury had to find that ''the battery [was] not committed with a deadly weapon''; conversely, to convict Skiba under NRS 200.481(2)(e), the jury had to find that ''the battery [was] committed with the use of a deadly weapon.''[9] Under a straightforward textual analysis, Skiba's dual convictions were *substantively* infirm: Either the beer bottle was a deadly weapon or it wasn't but the State could not have it both ways.

3.

Consistent with *Barton*, we disapprove of *Salazar*, *Skiba*, *Albitre*, and their ''redundancy'' progeny to the extent that they endorse a fact-based ''same conduct'' test for determining the permissibility of cumulative punishment. Rather than the facts or evidence in a specific case, the proper focus is on legislative authorization, beginning with an analysis of the statutory text. If the Legislature has authorized—or interdicted—cumulative punishment, that legislative directive controls. Absent express legislative direction, the *Blockburger* test is employed. *Blockburger* licenses multiple punishment unless, analyzed in terms of their elements, one charged offense is the same or a lesser-included offense of the other. As discussed in section II.A.2, *supra*, Jackson's and Garcia's multiple convictions and punishments for attempted murder, assault, and battery are statutorily authorized and, further, do not offend *Blockburger* or *Barton*. Thus, their cumulative punishment challenges fail.[10]

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*Cf. Braunstein v. State*, 118 Nev. 68, 78-79, 40 P.3d 413, 420-21 (2002) (explaining that language in NRS 201.230 makes ''crimes of sexual assault and lewdness . . . mutually exclusive and convictions for both based upon a single act cannot stand'').

[9]Although *Skiba* refers to NRS 200.481(2)(e)(1), the amendment subdividing paragraph (e) into two subparts post-dated Skiba's offense and conviction. *See* 1997 Nev. Stat., ch. 314, § 4, at 1180-81.

[10]Other jurisdictions that, like Nevada, hew to *Blockburger*'s ''same elements'' test have reached the same conclusion as to multiple punishment challenges involving comparable attempt and assaultive crime statutes. *E.g.*, *Com. v. Vick*, 910 N.E.2d 339, 353 (Mass. 2009); *State v. Johnson*, 739 N.W.2d 1, 5-6 (S.D. 2007); *see State v. Saiz*, 7 P.3d 1214, 1219 (Kan. 2000). Different results obtain in jurisdictions that, whether because of statutory mandate or case law, adhere to a variant of the same-conduct test *Barton* and *Dixon* disavow. *See State v. Swick*, 279 P.3d 747, 755 (N.M. 2012) (noting New Mexico's reliance on charging documents and jury instructions in assessing multiple punishment challenges); *State v. Lanier*, 950 N.E.2d 600, 603 (Ohio Ct.

In disapproving the stated reasoning in *Salazar*, *Skiba*, and *Albitre*, our holding is limited to the fact-based ''same conduct'' approach they use. Of note—and doubtless contributing to the confusion in this area—Nevada's redundancy case law has also captured ''unit of prosecution'' and alternative-offense challenges within its sweep, neither of which we question. Examples of ''unit of prosecution'' cases include *Wilson v. State*, 121 Nev. 345, 356-57, 114 P.3d 285, 293 (2005) (construing NRS 200.710(2) to authorize one conviction for the use of a minor in a sexual performance, not multiple, per-photograph convictions); *Firestone v. State*, 120 Nev. 13, 18, 83 P.3d 279, 282 (2004) (NRS 484.219(1), now NRS 484E.010, penalizes the act of leaving the scene of an accident, a single offense not dependent on the number of victims); *Ebeling v. State*, 120 Nev. 401, 404-05, 91 P.3d 599, 601-02 (2004) (NRS 201.220(1) criminalizes the act of exposing oneself and is not a per-witness offense); and *Bedard v. State*, 118 Nev. 410, 414, 48 P.3d 46, 48 (2002) (the Legislature has authorized multiple burglary convictions where several separately leased offices are broken into within a single building). While sometimes using ''redundancy'' language, these cases recognize that determining the appropriate unit of prosecution presents an issue ''of statutory interpretation'' and substantive law. *See Firestone*, 120 Nev. at 16, 83 P.3d at 281; *accord Sanabria v. United States*, 437 U.S. 54, 70 n.24 (1978); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1817-18 (1997).

Also dependent on statutory text and substantive criminal law are the alternative-offense ''redundancy'' cases like *Crowley v. State*, 120 Nev. 30, 33-34, 83 P.3d 282, 285 (2004), and *Braunstein v. State*, 118 Nev. 68, 78-79, 40 P.3d 413, 420-21 (2002); *see* Otto Kirchheimer, *The Act, the Offense, and Double Jeopardy*, 58 Yale L.J. 513, 516-17 (1949) (''‘Alternativity' refers to the mutually exclusive quality of certain offenses—the application of one logically excludes the application of another to the same factual situation.''). At issue in *Crowley* and *Braunstein* were dual convictions under NRS 201.230, which by its terms makes ''crimes of sexual assault and lewdness . . . mutually exclusive,'' meaning as a matter of statutory interpretation that the same act can yield a conviction for sexual assault or lewdness but not both. *Braunstein*, 118 Nev. at 79, 40 P.3d at 421; *Crowley*, 120 Nev. at 33-34, 83 P.3d at 285; *see also Wright v. State*, 94 Nev. 415, 418, 581 P.2d 442, 444 (1978) (Nevada's kidnapping statute, as a matter of substantive law, requires movement that increases the risk to the victim, over and above that to be expected in any robbery—essen-

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App. 2011) (applying Ohio's statutory ''same conduct'' test). For a general discussion see 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 24.8(e) (3d ed. 2011).

tially, a sufficiency-of-the-evidence determination); *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990) (to similar effect). This body of case law, too, is unaffected by our disapproval of the ''same conduct'' test.

III.

Jackson's final argument is that the district court erroneously admitted video surveillance evidence despite the State's violation of *Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (a defendant's due process rights may be violated if the State fails to preserve evidence and the defendant can show that the State acted in bad faith or that the defendant suffered undue prejudice).[11]

Jackson's reliance on *Leonard* is misplaced because the State could not have failed to preserve or destroyed evidence that it did not possess in the first place. As the record indicates, the police officers only collected the security footage Rodney compiled and failed to collect the omitted portions of the video. Thus, *Daniels v. State*, 114 Nev. 261, 956 P.2d 111 (1998), applies.

[Headnote 13]

In *Daniels*, we explained that '' 'police officers generally have no duty to collect all potential evidence from a crime scene.' '' 114 Nev. at 268, 956 P.2d at 115 (quoting *State v. Ware*, 881 P.2d 679, 684 (N.M. 1994)). However this rule is not absolute and we use a two-part test to determine whether the State's failure to gather evidence caused injustice. First, we consider whether the uncollected evidence was material. *Id.* at 267, 956 P.2d at 115. Second, if the evidence was material, we must determine whether the failure to gather evidence was the result of negligence or bad faith. *Id.*

[Headnotes 14, 15]

Evidence is material when there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different. *Id.* (discussing *Ware*, 881 P.2d at 685). Here, the exculpatory value of the omitted video is minimal. Jackson suggested that Duffy was complicit in the robbery and that the omitted footage might somehow prove that. This argument lacks merit because the State provided all video footage that featured Duffy and Jackson, including footage of their interaction before and during the robbery. Rodney also testified that the omitted video did not contain any relevant footage. Given that the omitted footage had no apparent exculpatory value we cannot con-

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[11]Jackson also argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), but this argument is without merit because *Brady* only governs failure to disclose evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 55-56 (1988).

clude that the evidence affected the result of the trial, especially in light of the substantial evidence presented by the State.

Jackson also did not establish bad faith, and nothing in the record on appeal indicates bad faith. The decision to compile only parts of the surveillance recordings appeared to the district court to be the product of concern for efficiency, not bad faith. We cannot disagree with that conclusion.

[Headnote 16]

Thus, the State's failure to gather the full video surveillance footage did not result in injustice and the district court did not err by denying Jackson's motion to strike the video evidence or grant a mistrial.[12]

For these reasons, we affirm the judgments of conviction.

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

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TAMARA HOLCOMB; BILLY JOE HOLCOMB; JOSEPH HOLCOMB; SHELLY HOLCOMB; AND KELLY MILLER, APPELLANTS, *v.* GEORGIA PACIFIC, LLC; KAISER GYPSUM COMPANY, INC.; KELLY-MOORE PAINT COMPANY, INC.; AND UNION CARBIDE CORPORATION, RESPONDENTS.

No. 56510

December 6, 2012 289 P.3d 188

Appeal from a district court summary judgment, certified as final under NRCP 54(b), in a torts action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Widow and children of construction and automotive repair worker who died of mesothelioma brought products liability action against manufacturers of asbestos-containing products and asbestos supplier. The district court granted manufacturers of joint-compound products summary judgment but denied summary judgment to manufacturers of automotive-brake products. After the district court certified its summary judgment for manufacturers of

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[12]We acknowledge that the district court incorrectly reviewed Jackson's motions under *Leonard*. Nevertheless, this mistake was harmless because the district court considered the materiality of the evidence and the possibility of bad faith and ultimately reached the right conclusion. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (''[i]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal'').

joint-compound products as final, widow and children appealed. The supreme court, CHERRY, C.J., held that: (1) as a matter of first impression, the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), frequency, regularity, proximity test applied to establish causation in an asbestos-related mesothelioma case; (2) genuine issues of material fact precluded summary judgment for manufacturers of joint-compound products; but (3) there was not an inference of probable exposure to asbestos that supplier provided to manufacturers of joint-compound products.

**Affirmed in part, reversed in part, and remanded.**

*Hutchison & Steffen, LLC*, and *Michael K. Wall*, Las Vegas; *Waters, Kraus & Paul* and *Paul C. Cook*, El Segundo, California, for Appellants.

*Troy E. Peyton, P.C.*, and *Troy E. Peyton*, Las Vegas; *Baker & Hostetler, LLP*, and *Mary Price Birk*, Denver, Colorado, for Respondent Union Carbide Corporation.

*Lewis & Roca, LLP*, and *Daniel F. Polsenberg*, Las Vegas, for Respondents Georgia Pacific, LLC; Kaiser Gypsum Company, Inc.; and Kelly-Moore Paint Company, Inc.

1. APPEAL AND ERROR.
   The supreme court would not consider argument by manufacturers of asbestos-containing products that expert's report on causation would not have been inadmissible at trial and could not be considered by the district court, in appeal of summary judgment for manufacturers in products liability action brought by widow and children of deceased construction and automotive repair worker, when manufacturers did not raise the issue in the district court.
2. APPEAL AND ERROR.
   A district court's order granting summary judgment is reviewed de novo, without deference to the findings of the lower court.
3. JUDGMENT.
   Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. NRCP 56(c).
4. JUDGMENT.
   A factual dispute is genuine, for purposes of a summary judgment, when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. NRCP 56(c).
5. JUDGMENT.
   When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. NRCP 56(c).
6. NEGLIGENCE; PRODUCTS LIABILITY.
   Causation, encompassing both medical causation and sufficient exposure, is a necessary element in proving an asbestos exposure case brought by a plaintiff with mesothelioma.

7. PRODUCTS LIABILITY.

To determine whether a defendant's asbestos-containing product was a substantial factor in causing a plaintiff's mesothelioma, the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), frequency, regularity, proximity test, as explained in *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216 (Pa. 2007), is applied, pursuant to which a plaintiff must establish exposure to the defendant's products on a regular basis over some extended period of time and in proximity to where the plaintiff actually worked, such that it is probable, or reasonable to infer, that the exposure caused the mesothelioma.

8. NEGLIGENCE.

Nevada relies on the substantial factor test to determine legal causation, otherwise known as proximate causation. Restatement (Second) of Torts § 31.

9. PRODUCTS LIABILITY.

When there is more than one supplier of the asbestos-containing products, the injured party in a mesothelioma case must prove that exposure to the products made or sold by that particular defendant was a substantial factor in causing the injury, which inquiry begins with the interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace, and requires an understanding of the physical characteristics of the workplace and of the relationship between the activities of the direct users of the product and the bystander plaintiff.

10. PRODUCTS LIABILITY.

Under the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), frequency, regularity, proximity test to establish whether an asbestos-containing product was a substantial factor in causing a plaintiff's mesothelioma, more than any exposure must be shown.

11. JUDGMENT.

To defeat summary judgment and bring the issue of exposure to asbestos to a jury, a mesothelioma plaintiff is required to show more than speculation or possibility that the product caused the injury.

12. JUDGMENT.

For a case to move past the summary judgment phase to a jury, a mesothelioma plaintiff in an asbestos exposure case must demonstrate an inference of probability, meaning that the plaintiff must put forth evidence that supports an inference of probable exposure to the defendant's asbestos product.

13. PRODUCTS LIABILITY.

In an asbestos case brought by a mesothelioma plaintiff involving multiple defendants, the plaintiff must provide evidence of exposure to each defendant's products in order to justify a reasonable inference that the product was a substantial factor in causing his mesothelioma; once some evidence of frequent, proximate, and regular exposure to a defendant's product is produced, it is for the jury to determine whether the exposure is sufficient to meet the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), frequency, proximity, and regularity prongs.

14. JUDGMENT.

Genuine issues of material fact, regarding whether construction and automotive repair worker's exposures to manufacturers' asbestos-containing joint-compound products were substantial factors in causing worker's mesothelioma under the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), frequency, proximity, and regularity test,

precluded summary judgment on the issue of causation on the claims asserted against such manufacturers in products liability action brought by worker's widow and children.

15. PRODUCTS LIABILITY.

Widow and children of construction and automotive repair worker who died from mesothelioma did not raise an inference of probable exposure under the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), frequency, proximity, and regularity test to asbestos that supplier provided to manufacturers of asbestos-containing joint-compound products, as required in order to establish that supplier's asbestos was a substantial factor in causing worker's mesothelioma, though supplier provided tons of asbestos to manufacturers in the pertinent time frame, where manufacturers used numerous suppliers of asbestos, and there was no evidence that supplier's asbestos was in the products used by construction worker.

Before the Court EN BANC.

## OPINION

By the Court, CHERRY, C.J.:

In this appeal, we examine the causation tests that courts have implemented when a plaintiff's or decedent's mesothelioma is alleged to have been caused by exposure to a defendant's asbestos-containing products. We take a balanced approach to find a causation test that is not overly rigorous or too relaxed in order to ensure protection for both manufacturers and consumers. Ultimately, we agree with the majority view and adopt the test set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), as that test is explained in *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 225 (Pa. 2007), for mesothelioma cases. Under the *Lohrmann* test, the plaintiff is required to prove exposure to the defendant's product ''on a regular basis over some extended period of time'' and ''in proximity to where the plaintiff actually worked,'' such that it is probable, or reasonable to infer, that the exposure caused the mesothelioma. *Lohrmann*, 782 F.2d at 1162-63.

In light of that standard, we then determine whether appellants submitted sufficient causation evidence to raise triable issues of material fact regarding whether, in this case, the decedent's mesothelioma was probably caused by the respondents' products. In doing so, we conclude that appellants presented sufficient evidence to defeat summary judgment as to respondents Kelly-Moore Paint Company, Inc.; Kaiser Gypsum Company, Inc.; and Georgia Pacific, LLC, but not as to respondent Union Carbide Corporation. Accordingly, we affirm the summary judgment in Union Carbide's favor but reverse the summary judgment as to the remaining respondents.

*FACTS AND PROCEDURAL HISTORY*

This case arises out of Randy Holcomb's (Holcomb) contraction of and resulting death from mesothelioma, a cancer affecting the lining of the lungs, typically caused by exposure to asbestos. Before Holcomb died in 2008, he and his wife, appellant Tamara Holcomb, filed a complaint against joint-compound manufacturers Bondex International, Inc., and related companies;[1] Kelly-Moore; Kaiser Gypsum; and Georgia Pacific, asbestos supplier Union Carbide,[2] and various automotive brake product manufacturers, distributers, and sellers. They alleged that Holcomb's mesothelioma was caused by exposure to asbestos contained in those parties' products, which Holcomb used for several years while working as a construction laborer and as an automotive mechanic. The personal injury complaint sounded in negligence and strict products liability, and it included a claim for loss of consortium. After Holcomb died in December 2008, the complaint was amended to include a wrongful death claim by Tamara Holcomb, individually and as the representative of Randy Holcomb's estate, and by their children, appellants Billy Joe Holcomb, Joseph Holcomb, Shelly Holcomb, and Kelly Miller.

*Holcomb's use of asbestos-containing products*

According to Holcomb's deposition testimony, he worked in the construction industry in Florida from 1969 through 1973, performing sheetrock and drywall work using both dry joint-compound powder packaged in paper bags, which had to be mixed with water prior to use, and pre-mixed joint compound packaged in buckets. According to Holcomb, the application of these joint-compound products created multiple occurrences of dusty, asbestos-laden conditions at each job site. After a year of military service, Holcomb moved to Las Vegas around 1975, where he resumed construction and sheetrock work for several years, first for a motel and later on construction sites. For the construction work in both Florida and Nevada, Holcomb recalled that he used Bondex, Paco, and Paco Quik-Set (manufactured by Kelly-Moore), Kaiser Gypsum, and Georgia Pacific brands of joint compound. He recalled using these brands within the first three years of moving to Las Vegas. Although Holcomb remembered using the identified joint-compound product brands while in Florida and Nevada, he did not recall using any particular product on any particular job or

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[1]Bondex and its related companies were dismissed from this appeal pursuant to an automatic bankruptcy stay.

[2]Kelly-Moore, Kaiser Gypsum, and Georgia Pacific are manufacturers of asbestos-containing products, while Union Carbide supplied and sold the asbestos to these manufacturers.

at any particular time, and he could not identify in concrete terms how often his construction duties encompassed sheetrock and drywall work. However, he had specific memories of using all of the named product brands on a regular basis.

Additionally, beginning in 1969 when he moved to Florida and regularly thereafter, Holcomb worked as a brake mechanic in the automotive industry, often performing these jobs on the side, in addition to his other work. The brake jobs allegedly required scuffing, beveling, and filing the edges of asbestos-containing brakes, creating dusty conditions in which he breathed. Holcomb asserted that these repeated exposures to the brake and joint-compound products caused his mesothelioma later in life.

*Causation evidence*

Appellants presented testimony and a letter from pathologist Dr. Ronald Gordon, Ph.D., in which he concluded after examining Holcomb's lung tissue that Holcomb's mesothelioma was attributable to asbestos. Dr. Gordon found ''significant asbestos fiber burden'' present in the lung tissue that ''was the causative factor in the development of his mesothelioma.''

[Headnote 1]

In addition, appellants submitted the report and deposition testimony of Dr. Edwin Holstein, M.D., M.S., who provided expert opinion regarding the medical cause of Holcomb's mesothelioma.[3] Dr. Holstein's report explained that Holcomb's work with asbestos-containing joint compounds and brake components caused asbestos to be released into the air, which Holcomb then breathed in. Dr. Holstein stated that Holcomb's resulting exposures to joint-compound and automotive-friction products acted cumulatively to cause his mesothelioma. He opined that ''each and every exposure to asbestos increases the total exposure and that the progressively increasing cumulative exposure increases the risk of developing an asbestos-related disease, including mesothelioma.'' He further opined that ''the best scientific evidence is that all significant exposures contribute to the causation of a subsequent mesothelioma.'' Dr. Holstein explained that ''joint compounds and brakes, when worked with in the ordinary and customary ways, regularly gave

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[3]Respondents Kelly-Moore, Kaiser Gypsum, and Georgia Pacific object to Holcomb's use of Dr. Holstein's expert report, asserting that it would have been inadmissible at trial and therefore could not be considered by the district court. However, as the report was provided to the district court and this issue was not raised below, it will not be considered on appeal. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) (stating that ''[i]t is well established that arguments raised for the first time on appeal need not be considered by this court'').

rise to significant amounts of asbestos dust in the air,'' and that the types of asbestos fibers used in joint compound and brakes cause mesothelioma. Dr. Holstein summarized his causation opinions by stating that Holcomb's mesothelioma was caused by exposure to asbestos in joint-compound and automotive-friction products.

*Procedural posture*

The joint-compound and automotive-brake defendants separately moved for summary judgment on the ground that Holcomb's deposition testimony was too vague to raise triable issues of fact regarding his threshold exposure to any asbestos contained in their products. The district court granted summary judgment to the joint-compound defendants, concluding that appellants had failed to submit sufficient evidence of exposure to allow a jury to find that those defendants' products were substantial factors in causing Holcomb's mesothelioma. The district court pointed out that Holcomb could not definitively describe when or how regularly and frequently he used each defendant's products, did not identify products but only manufacturers, and could not identify whether the products that he used contained asbestos. The court largely denied summary judgment to the automotive-brake defendants, concluding that appellants had submitted sufficient evidence of exposure to asbestos in the brake products to take the case to a jury.

In resolving the summary judgment motions, the district court considered caselaw from a host of jurisdictions, including a Fourth Circuit Court of Appeals opinion, *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), and a California Supreme Court decision, *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997). Ultimately, with regard to the joint-compound defendants, the district court determined that under any standard, Holcomb had not provided enough information regarding his use of asbestos-containing joint compound to proceed with the claims. The district court subsequently certified its orders granting summary judgment to the joint-compound defendants as final, pursuant to NRCP 54(b), and appellants appealed.[4]

## *DISCUSSION*

[Headnotes 2-5]

This court reviews a district court's order granting summary judgment de novo, without deference to the findings of the lower court. *Francis v. Wynn Las Vegas*, 127 Nev. 657, 670, 262 P.3d 705, 714 (2011). Summary judgment is proper only when ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[4]Trial as to the automotive-brake defendants was stayed pending the outcome of this appeal.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'' NRCP 56(c). ''A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* at 729, 1026 P.3d at 1031.

Here, appellants argue that the district court erred in granting summary judgment on the basis that Holcomb could not specify regular and frequent exposure to any particular product containing asbestos sufficient to demonstrate that the product was a substantial factor in causing his mesothelioma. They assert that respondents sought summary judgment based solely on Holcomb's alleged failure to establish a threshold amount of exposure. Because appellants' expert opined that even low exposures are sufficient to cause mesothelioma, appellants contend that they established a threshold amount of exposure by averring that Holcomb was exposed to asbestos in respondents' products, and they therefore presented a triable issue of material fact. Respondents contend that the district court properly granted summary judgment because appellants were not able to demonstrate a minimum level of exposure to asbestos in any particular joint-compound product.

*The causation standard in asbestos-induced mesothelioma cases*

[Headnote 6]

Regardless of the cause of action, causation—encompassing both medical causation and sufficient exposure—is a necessary element in proving appellants' case.[5] *See Klasch v. Walgreen Co.*, 127 Nev. 832, 837, 264 P.3d 1155, 1158 (2011) (plaintiff bears burden to establish causation as an element of negligence); *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009) (plaintiff bears burden to prove causation in products liability cases); *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal.

[5]*See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 51 (2008) (''[T]o prove causation in a toxic tort case, a plaintiff must show that the substance in question is capable, in general, of causing the injury alleged, and also that exposure to the substance more likely than not caused his injury.'' (emphasis omitted)); Anthony Z. Roisman, Martha L. Judy & Daniel Stein, *Preserving Justice: Defending Toxic Tort Litigation*, 15 Fordham Envtl. L. Rev. 191, 202 (2004) (''Irrespective of the nature of the cause of action alleged, at root all toxic tort cases require the same basic evidence. A toxic substance must be released from some product or property, the plaintiff and/or his property must be exposed to the toxic substance in some way, and that exposure must be a substantial cause of a present injury which plaintiff has suffered for which damages are recoverable. Of all these elements the two which have proven the most troublesome are exposure and causation.'').

1997) (''Most asbestos personal injury actions are tried on a products liability theory.''). Holcomb alleged asbestos exposure from multiple sources. While medical causation is not at issue here, appellants must demonstrate that a particular defendant sufficiently exposed Holcomb to asbestos in order to establish adequate causation to hold that defendant liable. Thus, we necessarily consider the exposure causation standard by which these types of cases will be evaluated in Nevada.

Given the often lengthy latency period between exposure and manifestation of injury, poor record keeping, and the expense of reconstructing such data, plaintiffs in asbestos litigation typically are ''unable to prove with any precision how much exposure they received from any particular defendant's products.'' David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 55 (2008); *see* Anthony Z. Roisman, Martha L. Judy & Daniel Stein, *Preserving Justice: Defending Toxic Tort Litigation*, 15 Fordham Envtl. L. Rev. 191, 203 (2004). To remedy this situation, which could unfairly deny deserving plaintiffs in asbestos cases any recovery, courts have fashioned a variety of causation standards in an attempt to balance the interests of plaintiffs with the interests of nonresponsible defendants. Bernstein, *supra*, at 51. Beginning with *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076 (5th Cir. 1973), the first successful asbestos case, courts have struggled to evaluate causation in a manner to best process asbestos claims, especially those that allege ''uncertain, modest, or very small'' exposure. Joseph Sanders, Michael D. Green & William C. Powers, Jr., *The Insubstantiality of the ''Substantial Factor'' Test for Causation*, 73 Mo. L. Rev. 399, 402 (2008). As a result, ''the precise requirements of proof of causation vary from state to state.'' James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 237 (2006).

Nevada has not articulated any particular causation standard in asbestos cases for determining whether a plaintiff's or decedent's mesothelioma is sufficiently caused by exposure to a defendant's products. Therefore, we consider the causation standards used in three preeminent asbestos litigation cases:[6] (1) the California Supreme Court's ''exposure-to-risk'' test of *Rutherford v. Owens-*

[6]The three approaches discussed in this opinion are not exhaustive. Other jurisdictions have adopted modified standards. *See, e.g.*, *Ingram v. ACandS, Inc.*, 977 F.2d 1332, 1344 (9th Cir. 1992) (adopting a standard that requires the asbestos product to play ''a role in the occurrence of the plaintiff's injuries''); *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 818 (9th Cir. 1992) (employing the ''inference of exposure'' test); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1481 (11th Cir. 1985) (''requir[ing] the plaintiff to show that he was exposed to [a] defendant's asbestos-containing product by working with or in close proximity to the product''). We believe, however, that the three approaches discussed are the most widely recognized causation standards in asbestos cases.

*Illinois, Inc.*, 941 P.2d 1203, 1206 (Cal. 1997); (2) the Texas Supreme Court's ''defendant-specific-dosage-plus-substantial-factor'' test in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007); and (3) the Fourth Circuit's ''frequency, regularity, proximity'' test set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986).

Appellants urge this court to adopt the causation standard for asbestos cases pioneered by the California Supreme Court in *Rutherford*. Conversely, Kelly-Moore, Kaiser Gypsum, and Georgia Pacific request that this court adopt the Fourth Circuit's *Lohrmann* standard. Union Carbide does not advocate for a specific test, but relies primarily on *Rutherford* and its progeny in responding to appellants' arguments. We discuss each standard in turn.

*Rutherford, Flores, and Lohrmann*

In *Rutherford*, a lung cancer case, the California Supreme Court held that ''plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's [or decedent's] exposure to defendant's asbestos-containing product in reasonable medical probability was a *substantial factor* in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer.'' 941 P.2d at 1219 (first emphasis added) (footnote omitted). While the court did not reduce ''substantial factor'' to a formulaic calculation,[7] *id.* at 1214 (''The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is neither possible nor desirable to reduce it to any lower terms.'' (internal quotations omitted)), the court held that the plaintiff need not demonstrate that ''fibers from the defendant's particular product were the ones, or among the ones, that actually produced the [asbestos-related disease].'' *Id.* at 1219 (emphasis omitted). Further, the court recognized that ''[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.'' *Id.* at 1220.

The *Rutherford* test ''treat[s] every non-negligible exposure to risk as a factual cause.'' Jane Stapleton, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*, 74 Brook. L. Rev. 1011, 1029 (2009). One legal commentator noted that, in *Rutherford*, the California Supreme Court departed from traditional tort principles by adopting a ''radical'' approach to risk exposure and ''proceeding on the idea (a fiction) that every asbestos fiber was involved in the cancer mechanism.'' *Id.* We agree with

[7]The *Rutherford* court did not ''endorse any one particular standard for establishing the requisite exposure to a defendant's asbestos products.'' 941 P.2d at 1223 n.12 (emphasis omitted).

these concerns and conclude that this test does not strike the proper balance, as its extraordinarily relaxed nature does not afford enough protection for manufacturers that may not have caused the resulting disease.

The Texas Supreme Court has also embraced a ''substantial factor'' test, but has applied the test more strictly than the California Supreme Court decision suggests is necessary. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007). In *Flores*, the plaintiff mechanic sued a brake-pad manufacturer, alleging that he suffered from asbestosis caused by working with the manufacturer's brake product ''on five to seven of the roughly twenty brake jobs he performed each week'' for three of the nearly 40 years that he worked with brakes. *Id.* at 766. A doctor testified that the plaintiff could have been exposed to '' 'some' respirable fibers'' during his years of brake work. *Id.* at 774. The jury found that the plaintiff sustained an asbestos-related disease and that the brake-pad manufacturer's negligence proximately caused that disease. *Id.* at 768.

After the court of appeals affirmed the judgment in favor of the plaintiff, the Texas Supreme Court, recognizing the proof difficulties accompanying asbestos claims, turned to California's *Rutherford* decision in establishing a suitable test. *Id.* at 772-73. The court acknowledged that plaintiffs cannot be expected to prove unknown details of a given asbestos fiber. *Id.* (citing *Rutherford*, 941 P.2d at 1219). Nonetheless, the court believed that merely showing regular exposure to ''some'' unspecified quantity of asbestos ''is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law.'' *Id.* at 772. Thus, the court relied in part on the *Rutherford* test in requiring the plaintiff to present not only evidence of regular exposure but also ''[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease.'' *Id.* at 773. In thereby recognizing that asbestosis is a dose-related disease, the Texas Supreme Court reversed the judgment, holding that the plaintiff failed to present sufficient evidence of causation concerning the plaintiff's exposure to asbestos in the manufacturer's product, including the extent and intensity of the plaintiff's exposure to disease-causing asbestos fibers, such as ''the approximate quantum of fibers to which [he] was exposed.'' *Id.* at 774; *see id.* at 771-74.[8]

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[8]Although the Texas Supreme Court looked to *Rutherford*, it is not clear that it agreed with the California court's designation of the substantial factor standard as ''broad'' when determining causation in asbestos cases. *See* 3 David L. Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 26:5 (2011).

We conclude that in protecting the manufacturer, the *Flores* causation test swings too far beyond *Rutherford* to the point where it overburdens the claimant, who might not be able to sufficiently demonstrate not only the dosage quantity of exposure to a particular defendant's product but also the total asbestos dosage to which he was exposed. We conclude that the *Flores* application of the ''substantial factor'' test is too stringent. *Id.* at 773.

[Headnote 7]

Instead, we are persuaded by the *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), ''frequency, regularity, proximity'' test, as applied in mesothelioma cases. *See Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 217 (Pa. 2007). ''The majority of the federal circuits and state courts addressing this question have chosen to apply the *Lohrmann* test to determine whether the plaintiff has satisfied his burden of showing that a specific defendant's products caused his disease.'' Charles T. Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 Am. J. Trial Advoc. 571, 572 (2008); *see Slaughter v. Southern Talc. Co.*, 949 F.2d 167, 171 n.3 (5th Cir. 1991) (most federal circuit courts and state courts, including ''Michigan, Massachusetts, New Jersey, Illinois, Pennsylvania, Maryland, Nebraska, and Oklahoma have adopted the test''); *see, e.g.*, *Chism v. W.R. Grace & Co.*, 158 F.3d 988, 992 (8th Cir. 1998); *Shetterly v. Raymark Industries, Inc.*, 117 F.3d 776, 780 (4th Cir. 1997); *Dillon v. Fibreboard Corp.*, 919 F.2d 1488, 1491-92 (10th Cir. 1990); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 380 (3d Cir. 1990); *Hyde v. Owens-Corning Fiberglas Corp.*, 751 F. Supp. 832, 833 (D. Ariz. 1990); *Chavers v. General Motors Corp.*, 79 S.W.3d 361, 367 (Ark. 2002); *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 757 (Miss. 2005). The *Lohrmann* causation standard has also been adopted by statute in Florida, Georgia, and Ohio. *See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 55-56 n.16 (2008).

The plaintiff in *Lohrmann* was a pipefitter at a shipyard in Baltimore, Maryland, for nearly 40 years. 782 F.2d at 1158. He brought suit in negligence and strict liability against 19 defendants, alleging that he had asbestosis resulting from exposure to defendants' asbestos-containing products during his employment. *Id.* At the conclusion of trial, the district court granted a directed verdict in favor of three of the defendants, finding that ''there was insufficient evidence to show the necessary element of causation between use of [the defendants'] products and [the plaintiff's] claim of asbestosis.'' *Id.* at 1161-62. The plaintiff appealed.

In crafting a causation standard, the Fourth Circuit ''attempt[ed] to reduce the evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs' injuries.'' Bern-

stein, *supra*, at 56; *see also Sholtis v. American Cyanamid Co.*, 568 A.2d 1196, 1207 (N.J. Super. Ct. App. Div. 1989) (stating that the *Lohrmann* test ''is a fair balance between the needs of plaintiffs (recognizing the difficulty of proving contact) and defendants (protecting against liability predicated on guesswork)''). The court held that when a plaintiff alleges multiple sources of exposure to asbestos, the plaintiff is required to prove exposure to a ''specific product'' attributable to the defendant, ''on a regular basis over some extended period of time'' and ''in proximity to where the plaintiff actually worked,'' such that it is probable, or reasonable to infer, that the exposure to the defendant's products caused plaintiff's injuries. *Lohrmann*, 782 F.2d at 1162-63; *see Chavers*, 79 S.W.3d at 369 (adopting the ''frequency, regularity, proximity'' test in a mesothelioma case). The court provided that ''this is a *de minimis* rule since a plaintiff must prove more than a casual or minimum contact with the product.'' *Lohrmann*, 782 F.2d at 1162. In addition, the court noted that ''[t]his is a reasonable rule when one considers the Maryland law of substantial causation and the unusual nature of the asbestosis disease process, which can take years of exposure to produce the disease.'' *Id.* Furthermore, the court stated, ''mere proof that the plaintiff and a certain asbestos product are at the shipyard at the same time, without more, does not prove exposure to that product.'' *Id.*

In affirming the district court's directed verdict, the Fourth Circuit held that the plaintiff did not present evidence to show sufficient contact with the defendants' products and failed to raise a permissible inference that exposure to the defendants' products was a substantial factor in the development of his asbestosis. *Id.* at 1163-64. There was testimony and evidence presented showing that asbestos-containing products—namely, cloth and pipe covering—were used at the shipyard on an almost daily basis. *Id.* at 1163. As to two of the directed verdict defendants, the plaintiff failed to demonstrate any exposure to their products. *Id.* at 1163-64. With regard to the other defendant, the plaintiff testified he was exposed to an asbestos-containing pipe covering on ten to fifteen occasions of between one and eight hours' duration during the term of his employment, but the court concluded that this exposure was insufficient to infer that it was a substantial factor in causing his asbestosis. *Id.* at 1163.

The *Lohrmann* test has also been applied in mesothelioma cases. In *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 225 (Pa. 2007), the Pennsylvania Supreme Court, citing *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992), explained that the *Lohrmann* test provides helpful evaluative guidance in distinguishing cases in which the plaintiff can demonstrate that the defendant's product

likely caused his injury from those in which he cannot so show due to minimal exposure to the defendant's product, but it is not ''a rigid standard with an absolute threshold necessary to support liability.'' The Pennsylvania court recognized that the *Lohrmann* factors should be ''tailored to the facts and circumstances of the case.'' *Gregg*, 943 A.2d at 225. Noting that the plaintiff's expert had explained that, unlike asbestosis, mesothelioma can result from low doses of asbestos,[9] the court reasoned that ''the frequency and regularity prongs become somewhat less cumbersome'' in such cases. *Id*. (internal quotations omitted). In conclusion, the Pennsylvania Supreme Court held that, at the summary judgment phase, courts must ''make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.'' *Id*. at 227.

[Headnote 8]

Because this test balances the rights and interests of the manufacturers with those of the claimants, we conclude that it is the appropriate test for use in this state. Like Maryland, Nevada relies on the substantial factor test of the Restatement (Second) of Torts § 431 to determine legal causation, otherwise known as proximate causation. *See Lohrmann*, 782 F.2d at 1162; *County of Clark v. Upchurch*, 114 Nev. 749, 759, 961 P.2d 754, 760-61 (1998); *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (stating that ''substantial-factor causation . . . is appropriate when 'an injury may have had two causes, either of which, operating alone, would have been sufficient to cause the injury' '' (quoting *Johnson v. Egtedar*, 112 Nev. 428, 435, 915 P.2d 271, 276 (1996))). Accordingly, we adopt the *Lohrmann* test, as explained in *Gregg*, for use in determining whether a defendant's product was a substantial factor in causing the plaintiff's mesothelioma.

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[9]It appears generally accepted that asbestosis typically results from long-term, high-level exposure to asbestos or relatively brief exposure to extremely high levels of asbestos. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 839 (2009); *Zimko v. American Cyanamid*, 905 So. 2d 465, 484 n.21 (La. Ct. App. 2005); *Continental Cas. Co. v. Employers Ins. Co.*, 871 N.Y.S.2d 48, 61 (App. Div. 2008); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771 (Tex. 2007). On the other hand, as appellants' expert testified in this case, mesothelioma is a signature asbestos disease that can be contracted from low doses of asbestos exposure. *See Zimko*, 905 So. 2d at 484 n.21; *Flores*, 232 S.W.3d at 771; *see also In re Asbestos Products Liability Litigation*, No. MDL-875, 2012 WL 760739, at *5 (E.D. Pa. Feb. 17, 2012).

*Sufficiency of the evidence relating to Holcomb's mesothelioma*

We next address whether, under the *Lohrmann* test, appellants submitted sufficient evidence to raise triable issues of fact on the issue of causation in response to the summary judgment motion in this case.

[Headnote 9]

Where, as here, there is more than one supplier of the asbestos-containing products, the injured party must prove that exposure to the products made or sold by that particular defendant was a substantial factor in causing the injury. *See County of Clark v. Upchurch*, 114 Nev. 749, 759, 961 P.2d 754, 760-61 (1998); *see also Wyeth*, 126 Nev. at 465, 244 P.3d at 778. This fact-specific inquiry begins with the '' 'interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace. This requires an understanding of the physical characteristics of the work place and of the relationship between the activities of the direct users of the product and the bystander plaintiff.' '' *Georgia-Pacific v. Pransky*, 800 A.2d 722, 725 (Md. 2002) (quoting *Eagle-Picher v. Balbos*, 604 A.2d 445, 460 (Md. 1992)).

[Headnote 10]

In addressing the overriding issue of whether appellants adequately established sufficient exposure to each of the respondents' asbestos-containing products such that the exposure was a substantial factor in Holcomb contracting mesothelioma, we first address the standard for finding that a respondent's product caused Holcomb's mesothelioma.[10] In this case, neither party takes the position that some jurisdictions take that ''any'' or ''each and every'' exposure, even if it is just one strand of asbestos, is a substantial factor in causing mesothelioma. *See John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 531 (Ga. Ct. App. 1997) (''Expert testimony showed that it is universally agreed that asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful.''); *McAskill v. American Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009) (acknowledging that ''[m]edical science has proven a causal relationship between asbestos exposure and mesothelioma above background levels,'' that ''brief exposures to asbestos have caused mesothelioma,'' and that ''every non-trivial exposure to asbestos contributes to and constitutes a cause of mesothelioma''); *Held v. Avondale Industries,*

[10]While the parties agree that medical causation is not at issue in this case, it is necessarily intertwined with the determination of whether any of the exposures were a substantial factor in the contraction of the disease.

*Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996) (medical evidence showed that even slight exposure to asbestos is a significant contributing cause of mesothelioma). In fact, the courts that adopt the three-factor test of frequency, regularity, and proximity regularly reject the ''any'' exposure argument. *See, e.g.*, *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986) (rejecting the ''any'' rule as being contrary to Maryland's substantial causation law); *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 226-27 (Pa. 2007) (''[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case.''). Thus, more than any exposure must be shown.

The medical testimony presented by appellants was undisputed. Appellants established that cumulative exposures to asbestos above the background level in ambient air increase the total exposure, and cumulative exposure increases the risk of developing mesothelioma. Because of this, and the fact that each exposure shortens the average latency period for the appearance of mesothelioma, the testimony provided that all *significant* exposures contribute to the causation of mesothelioma. Thus, *de minimis* exposures are insufficient to prove that the exposure was a substantial factor in causing mesothelioma.

[Headnotes 11-13]

To defeat summary judgment and bring the issue of exposure to a jury, a plaintiff is required to show more than speculation or possibility that the product caused the injury. *See Tragarz v. Keene Corp.*, 980 F.2d 411, 418-23 (7th Cir. 1992). For a case to move past the summary judgment phase to a jury, the plaintiff must demonstrate ''*an inference* of probability,'' meaning that ''the plaintiff must put forth evidence that supports an inference of probable exposure to the defendant's asbestos product.'' *Id.* at 418. Appellants must provide evidence of Holcomb's exposure to each of respondents' products in order to justify a reasonable inference that the product was a substantial factor in causing his mesothelioma. Once some evidence of frequent, proximate, and regular exposure to a respondent's product is produced, it is for the jury to determine whether the exposure is sufficient to meet the frequency, proximity, and regularity prongs. *See id.* at 418-23.

*Holcomb's testimony and other evidence*

Appellants argue that they demonstrated triable issues of fact regarding whether Holcomb was exposed regularly and frequently to

asbestos in respondents' products. They assert that this was shown by Holcomb's deposition testimony that he inhaled dust from the joint-compound products manufactured by respondents during his years of construction work in Florida and Nevada between 1969 and 1976. Appellants also argue that once they demonstrated evidence of Holcomb's more-than-minimal exposure to respondents' products, the specificity of his testimony—whether Holcomb recalled specific jobsites, purchased the products himself, or remembered specific logos or lettering—are issues that go merely to the weight of his testimony and thus are appropriate for consideration by the trier of fact, not by the court on a summary judgment motion.

Respondents assert that, when compared to his testimony regarding his work with brake products, Holcomb's generalized and vague testimony regarding occasional work with joint-compound products failed to demonstrate a reasonable inference that those products, and the specific product of any individual manufacturer, caused his mesothelioma. They point out that Holcomb could not identify any particular Kaiser Gypsum or Georgia Pacific product that he used; could not describe the products' labels, packaging, or markings; and could not recall how often during his work in construction that he used any particular product. Respondents contend that Holcomb could not identify whether the products that he used actually contained asbestos. Except with respect to Union Carbide, we disagree that summary judgment was warranted on this basis.

*Holcomb's testimony regarding Kelly-Moore, Kaiser Gypsum, and Georgia Pacific products*

[Headnote 14]

Holcomb testified that he used Kelly-Moore, Kaiser Gypsum, and Georgia Pacific products on numerous occasions and in several locations over an approximately seven-year period, interrupted only by a short stint in the military. While he could not identify the particular packaging, logos, or names of some of the products, and he could not identify specific locations and jobs on which he used the products 40 years ago, that level of identification is not required. Ultimately, his testimony and other evidence provide the basis for a reasonable inference that Holcomb's mesothelioma was caused by exposure to each of the respondents' products.

Preliminarily, Holcomb presented evidence that asbestos-containing joint compounds, when used in the ordinary and customary ways, regularly gave rise to significant amounts of asbestos in the air. Thus, the joint-compound user and those around him directly breathed in the asbestos-laden dust. Because Holcomb

testified to using these products in ways that caused him to inhale asbestos contained therein, the proximity prong is met with regard to each instance of exposure.

*Kelly-Moore*

Holcomb presented evidence that he used Kelly-Moore's Paco joint-compound brand, including Paco Quik-Set, in Florida and Las Vegas. Respondents can point to no undisputed evidence that Paco products were not available in Florida or Las Vegas during the relevant time. All of Kelly-Moore's Paco joint compounds contained asbestos through 1976 or 1978; thus any failure to identify a particular Paco product is not dispositive. While respondents point out that one or even a few exposures is not enough, Holcomb stated that he used Kelly-Moore's Paco products numerous times throughout the period. This is more than a minimal amount and, when considered with Holcomb's asserted direct exposure to asbestos in the product, may amount to regular and proximate exposure over an extended period sufficient to cause mesothelioma. Accordingly, a jury could reasonably infer that Kelly-Moore's Paco products were a substantial factor in the development of Holcomb's cancer.

*Kaiser Gypsum*

When viewed in the light most favorable to Holcomb, the evidence of Holcomb's exposure to Kaiser Gypsum's products supports a finding that those products were a substantial factor in causing Holcomb's mesothelioma. This evidence was legally sufficient to permit a jury to infer proximate cause. Holcomb testified that he was accustomed to using Kaiser Gypsum's products throughout his years in both Florida and Las Vegas. Holcomb testified that he used Kaiser Gypsum's products ''on several jobs, lots and lots.'' While Holcomb could identify only the manufacturer, Kaiser Gypsum, and not any of Kaiser Gypsum's drywall products, most of Holcomb's alleged use of Kaiser Gypsum products pre-dated Kaiser Gypsum's introduction of a non-asbestos formula in 1974. Thus, any Kaiser Gypsum products that Holcomb used prior to 1974 necessarily contained asbestos. Holcomb only needed to show sufficient evidence of probable exposure, and he remembered seeing the Kaiser Gypsum brand name on the labels. Putting this into context with the medical evidence that minimal dosages of asbestos can contribute to mesothelioma and the more relaxed nature of the test in mesothelioma cases, *Gregg*, 943 A.2d at 225, we conclude that Holcomb has presented sufficient evidence to defeat summary judgment against Kaiser Gypsum. Accordingly, the dis-

trict court should not have granted summary judgment, as issues of material fact remain for the jury to resolve.

*Georgia Pacific*

Holcomb testified that he used Georgia Pacific brand joint-compound products on countless jobsites in Florida and Las Vegas and was ''accustomed to using'' Georgia Pacific products. Holcomb recalled seeing the Georgia Pacific name on bags, recalled using Georgia Pacific products ''a lot,'' ''many times,'' and remembered using Georgia Pacific products when working at the motel. Holcomb identified the Georgia Pacific brand joint compound as one he often used between 1969 and 1973 in Florida and 1975 and 1978 in Las Vegas. All Georgia Pacific joint compound contained asbestos from 1956 to 1974. Georgia Pacific began making non-asbestos joint compound in 1972 or 1973. Though Holcomb could not state whether the Georgia Pacific joint compound he used while in Las Vegas contained asbestos, he sufficiently raised issues of material fact concerning his use of Georgia Pacific joint compound from 1969 to 1974. Because Holcomb was only required to show ''an inference of probable exposure to the defendant's asbestos product,'' *Tragarz v. Keene Corp.*, 980 F.2d 411, 418 (7th Cir. 1992), we conclude that Holcomb met this minimal burden.

*Union Carbide*

[Headnote 15]

Holcomb established that the Kelly-Moore, Kaiser Gypsum, and Georgia Pacific products he may have regularly and frequently used contained asbestos, and therefore summary judgment was not appropriate as to those defendants. Summary judgment was warranted, however, as to Union Carbide. Appellants argue that given the thousands of tons of asbestos that Union Carbide supplied to these three manufacturers in the pertinent time frame, triable issues of fact exist regarding the presence of Union Carbide fibers in the joint compounds used by Holcomb. Union Carbide contends that summary judgment was appropriate because appellants did not carry their burden to show that Union Carbide asbestos was actually in any product allegedly used by Holcomb.[11]

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[11]On appeal, Union Carbide abandons its argument that it was entitled to a sophisticated-user defense. It instead argues, for the first time on appeal, that it is entitled to a bulk supplier defense, as it was a seller of raw materials to third-party manufacturers whom it warned. Additionally, the district court did not rule on appellants' claims against Union Carbide for false representation or intentional failure to warn, and those claims are not appealed here. Because we conclude that summary judgment was properly granted in Union Carbide's favor, these issues are rendered moot by the resolution of this appeal.

We agree with Union Carbide. Deposition testimony supports that Kelly-Moore, Kaiser Gypsum, and Georgia Pacific used numerous suppliers of asbestos.[12] Without knowing the specific products that Holcomb used at a particular time, appellants cannot show that Union Carbide's asbestos was in the products used by Holcomb.[13] Appellants, who bear the burden of showing that there is an issue of material fact, have provided no admissible evidence in this regard. *See School Dist. No. 1J v. ACandS Inc.*, 767 F. Supp. 1051, 1056 (D. Or. 1991) (granting summary judgment for the defendant where plaintiff identified an asbestos-containing product manufactured by the defendant and one other company because there was no evidence that it was the defendant's products that were installed and not the products of the other manufacturer); *Estate of Henderson v. W.R. Grace Co.*, 541 N.E.2d 805, 808 (Ill. App. Ct. 1989) (affirming summary judgment for the defendant, despite evidence that plaintiff was exposed either to the defendant's product or an approved equal, because the evidence failed to show whether the defendant's product, as opposed to an approved equal, was actually used at the plaintiff's job site); *Samarin v. GAF Corp.*, 571 A.2d 398, 406 (Pa. Super. Ct. 1989) (affirming summary judgment when evidence showed that the plaintiff was exposed to an asbestos cloth, but the plaintiff could not identify the brand and there were multiple suppliers). As there is no triable issue of fact, the district court properly granted summary judgment in favor of Union Carbide, albeit on different grounds. *See Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877-78 n.9 (1999) (determining that when an issue is solely a question of law, this court may hear the issue in the interests of judicial economy if it chooses); *Ford v. Showboat Operating Co.*,

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[12]Respondents challenge the use of interrogatory evidence from other cases on the grounds that the evidence was not properly disclosed and the cases are separate and unrelated. However, as the use of this evidence is unnecessary to the resolution of this appeal, this contention will not be discussed further. Further, any argument concerning the use of depositions raised in the reply brief will not be considered by this court. *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984) (a party may not raise a new issue for the first time in a reply brief).

[13]Appellants cite *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010), to support their argument that they are not legally required to demonstrate that Union Carbide was the exclusive fiber supplier, as they are only held to the standard that it was more likely than not. Even if this were the standard and if appellants could use all of the contested evidence, they still have not shown that Union Carbide was a main supplier. *See Lineaweaver v. Plant Insulation Co.*, 37 Cal. Rptr. 2d 902, 907-08 (Ct. App. 1995) (recognizing that ''the probability that any one defendant is responsible for plaintiff's injury decreases with an increase in the number of possible tortfeasors'' and that ''the wrongdoer who caused the harm . . . should bear the cost, and it serves no justice to fashion rules which allow responsible parties to escape liability while demanding others to compensate a loss they did not create'').

110 Nev. 756, 755, 877 P.2d 546, 549 (1994) (this court will '' 'affirm the order of the district court if it reached the correct result, albeit for different reasons.' '' (quoting *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987))).

*CONCLUSION*

In order to ensure protection for both asbestos manufacturers and consumers injured by asbestos exposure, we adopt the test set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), as used in cases where a plaintiff's mesothelioma is alleged to have been caused by exposure to products containing asbestos. *See Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 225 (Pa. 2007). Based on the adoption and application of that test, we conclude that appellants raised inferences of probable exposure to Kelly-Moore, Kaiser Gypsum, and Georgia Pacific's products sufficient to defeat summary judgment as to those respondents, but not as to Union Carbide. Therefore, we affirm the grant of summary judgment in Union Carbide's favor but conclude that the district court erred in granting summary judgment for the remaining respondents. We thus reverse the summary judgment in part and remand this matter for further proceedings.

DOUGLAS, SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.